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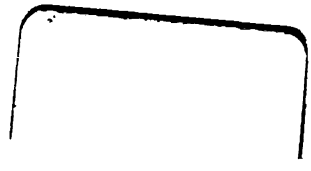

CASES

ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

FOR THE

SEVENTH JUDICIAL CIRCUIT.

BY

JOSIAH H. BISSELL,
OF THE CHICAGO BAR,
OFFICIAL REPORTER.

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JUDGES,

SITTING IN THE SEVENTH CIRCUIT DURING THE PERIOD COVERED BY THIS VOLUME.

HON. JOHN M. HARLAN,

ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES.

Allotted to the Seventh Circuit. Appointed November 29, 1877.

HON. THOMAS DRUMMOND,

CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT.

Appointed December 22, 1869. District Judge since February 19, 1850.

HON. SAMUEL H. TREAT,

DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Appointed March 3, 1855.

HON. WALTER Q. GRESHAM,

DISTRICT JUDGE FOR THE DISTRICT OF INDIANA.

Appointed December 21, 1869.

HON. HENRY W. BLODGETT,

DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS.

Appointed January 11, 1870.

HON. CHARLES E. DYER,

DISTRICT JUDGE FOR THE EASTERN DISTRICT OF WISCONSIN.

Appointed February 10, 1875.

HON. ROMANZO BUNN,

DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WISCONSIN.

Appointed October 13, 1877.

32C41

TABLE OF CASES.

A.

Adams *ads.* Williams.....452
Alkan *vs.* Bean..... 83
American Bridge Co. *ads.* Smith.....312
Atlas National Bank *vs.* The F. B. Gardner Co.....537

B.

Badger *ads.* Eddy.....238
Bailey *ads.* Irwin.....523
Barnes *vs.* Chicago, Milwaukee and St. Paul R. R. Co...514
Bartholomae *ads.* Gottfried.....219
Basket *ads.* Hassell.....303
Bayliss *vs.* LaFayette, Muncie and Bloomington R'y Co..193
Bean *ads.* Alkan..... 83
Beef Slough, etc., Co. *ads.* Heerman.....334
Same *ads.* United States.....421
Behm *vs.* Western Union Telegraph Co.....131
Benson, *In re*.....116
Board of Supervisors *ads.* North Wisconsin R'y Co....414
Board of Supervisors of Portage Co. *ads.* Preble.....358
Bolting *ads.* Schulze.....174
Broad *vs.* Deuster.....265

Brown *ads.* Pierce.....534
Buford *vs.* Henzier.....177

C.

Chicago, Milwaukee and St. Paul R. R. Co. *ads.* Barnes..514
City of Chicago *ads.* Stow..... 47
Clapp *ads.* Wilson Packing Co.....154
Clapp *ads.* Wilson Packing Co.....545
Columbus, Chicago and Indiana Central R'y Co. *ads.* Pittsburg, Cincinnati and St. Louis R'y Co.....456
Connecticut Mutual Life Ins. Co. *ads.* Hards.....234
Connecticut Mutual Life Ins. Co. *vs.* Tyler.....369
Croft Brothers, *In re*.....188
Cullerton *ads.* United States.....166

D.

Davis *ads.* National Bank of Madison.....100
Deuster *ads.* Broad.....265

E.

Eddy *vs.* Badger.....238
Evansville, Cairo and Memphis Steam Packet Co. *ads.* Harvey..... 99
Ex parte Weimer and Reynolds.....321

F.

Farrell *ads.* United States.....259
Farwell, The L. J..... 61
Fink *ads.* La Mothe.....493
Fink *ads.* Salentine.....503
First National Bank *ads.* Wright.....243

Flint *ads.* Leidersdorf.....327
Frostel *ads.* King.....510

G.

Gardner, The F. B. Co. *ads.* Atlas National Bank.....537
Gaugar *ads.* Gilbert.....214
Gilbert *vs.* Gaugar.....214
Goldman *ads.* Strong.....552
Goodrich Transportation Co. *ads.* United States.....224
Gottfried *vs.* Bartholomae.....219
Grau *vs.* McVicker..... 13
Gregory *vs.* Marks..... 44

H.

Hadden *ads.* Howe Machine Co.....208
Hadduck *ads.* Payson.....293
Hamlin, Hale & Co., *In re*.....122
Hards *vs.* Connecticut Mutual Life Ins. Co.....234
Harvey *vs.* Evansville, Cairo and Memphis Steam Packet Co..... 99
Hassell *vs.* Basket.....303
Hawes *vs.* Mann..... 21
Heerman *vs.* Beef Slough, etc., Co.....334
Henzier *ads.* Buford.....177
Hildrup *ads.* Stinson.....376
Howe Machine Co. *vs.* Hadden.....208
Hughes, *In re*.....107
Hume *vs.* Pittsburg, Cincinnati and St. Louis R. R. Co.. 31
Hunter *ads.* Wilson Packing Co.....429

I.

Indianapolis, Bloomington and Western R'y Co. *ads.* Turner 315
Same *ads.* Same 380
Same *ads.* Same 527
In re Benson 116
In re Croft Brothers 188
In re Hamlin, Hale & Co. 122
In re Hughes 107
In re Roberts 426
In re Roseberry 112
In re Sauthoff & Olson 35
In re Sturges 79
In re Thomas & Sivyer 139
International Bank *ads.* Sherman 371
Irwin *vs.* Bailey 523

K.

Kerr *vs.* South Park Commissioners 276
King *vs.* Frostel 510

L.

La Fayette, Muncie and Bloomington R'y Co. *ads.* Bayliss. 193
La Mothe *vs.* Fink 493
Larsen *ads.* Singer Manufacturing Co. 151
Leidersdorf *vs.* Flint 327
Leslie *vs.* Town of Urbana 435

M.

McCarthy *vs.* Traveler's Insurance Co. 362
McDonnell *ads.* Sacket 394
McDonald *ads.* United States 439

McVicker *ads.* Grau 13
Mann *ads.* Hawes 21
Marks *ads.* Gregory 44
Mears *ads.* Merchants National Bank 158
Mears *ads.* Twichell 211
Merchants National Bank *vs.* Mears 158
Mutual Life Insurance Co. *vs.* Wilcox 197
Mutual Life Insurance Co. *vs.* Wilcox 203

N.

National Bank of Madison *vs.* Davis 100
North Wisconsin R'y Co. *vs.* Board of Supervisors 414

O.

One Copper Still *ads.* United States 270
Overman *vs.* Quick 134

P.

Payson *vs.* Hadduck 293
Perkins *ads.* Smith 73
Pittsburgh, Cincinnati and St. Louis R. R. Co. *ads.* Hume. 31
Same *vs.* Columbus, Chicago and Indiana Central R'y Co. 456
Pierce *vs.* Brown 534
Preble *vs.* Board of Supervisors of Portage County 358

Q.

Quick *ads.* Overman 134

R.

Rindskopf *ads.* United States 507
Roberts, *In re* 426

Roberts *vs.* Sheldon.....398
Robertson, The.....180
Roseberry, *In re*.....112

S.

Sacket *vs.* McDonnell.....394
Salentine *vs.* Fink.....503
Salentine *ads.* United States.....404
Sauthoff & Olson, *In re*..... 35
Schulze *vs.* Bolting.....174
Sheldon *ads.* Roberts.....398
Sherman *vs.* International Bank.....371
Singer Manufacturing Co. *vs.* Larsen.....151
Smith *vs.* American Bridge Co.....312
Smith *vs.* Perkins..... 73
South Branch Distilling Co. *ads.* United States.....162
South Park Commissioners *ads.* Kerr.....276
Stinson *vs.* Hildrup.....376
Stow *vs.* City of Chicago..... 47
Strause *vs.* Western Union Telegraph Co.....104
Strong *vs.* Goldman.....552
Sturges, *In re*..... 79

T.

The F. B. Gardner Co. *ads.* Atlas National Bank.....537
The L. J. Farwell..... 61
The Robertson.....180
Thomas & Sivyer, *In re*.....139
Town of Urbana *ads.* Leslie.....435
Traveler's Insurance Co. *ads.* McCarthy.....362

Turner *vs.* Indianapolis, Bloomington and Western R'y Co. 315
Same *vs.* Same 380
Same *vs.* Same 527
Twichell *vs.* Mears 211
Tyler *ads.* Connecticut Mutual Life Ins. Co. 369
Tysen *vs.* Wabash Railway Co. 247

U.

United States *vs.* Beef Slough, etc., Co. 421
United States *vs.* Cullerton 166
United States *vs.* Farrell 259
United States *vs.* Goodrich Transportation Co. 224
United States *vs.* McDonald 439
United States *vs.* One Copper Still 270
United States *vs.* Rindskopf 507
United States *vs.* Salentine 404
United States *vs.* South Branch Distilling Co. 162
United States *vs.* Van Slyke 227
Urbana, Town of *ads.* Leslie 435

V.

Van Slyke *ads.* United States 227

W.

Wabash Railway Co. *ads.* Tysen 247
Weimer and Reynolds, *Ex parte* 321
Western Union Telegraph Co. *ads.* Behm 131
Same *ads.* Strause 104
Whittlesey *ads.* Woven Wire Mattress Co. 23
Wilcox *ads.* Mutual Life Insurance Co. 197

Wilcox *ads.* Mutual Life Insurance Co.....203
Williams *vs.* Adams.....452
Wilson Packing Co. *vs.* Clapp.....154
Wilson Packing Co. *vs.* Clapp.....545
Wilson Packing Co. *vs.* Hunter.....429
Woven Wire Mattress Co. *vs.* Whittlesey..... 23
Wright *vs.* First National Bank.....243

CASES

ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

SEVENTH JUDICIAL CIRCUIT.

MAURICE GRAU vs. JAMES H. McVICKER.

CIRCUIT COURT — NORTHERN DISTRICT OF ILLINOIS — MAY, 1874.

1. LEASE—PRINCIPAL AND AGENT.—In a lease of a theater, the lessee was described as "M. G., representing Messrs. C. A. C. & Co., manager of the Opera Company," and the lease was signed by "M. G. representing C. A. C. & Co." One clause of the lease was: "The said M. G. agrees to pay," etc.: *Held*, That M. G. was liable as principal, and that the words added to his name were simply words of description.

2. EXECUTORY CONTRACTS—NOTICE OF RENUNCIATION — PREMATURE SUIT.—Where one makes a contract to be performed in the future, and before the time for performance has arrived, notifies the other party that he will not comply with its terms, this may be treated as an immediate breach of the contract, and suit commenced before the time for performance has arrived is not prematurely brought.

3. BREACH OF CONTRACT.—A declaration that a party will not perform an act in the future, may be treated as a breach of a promise to perform such act.

4. SAME—SET-OFF.—A. agreed to rent B.'s theater for two weeks from the 9th of February. On the 9th of January he informed B. of his intention not to take or occupy the theater according to agreement: *Held*, that B. might treat this notice as a breach of the contract, and that the amount of the rental under the contract would be a valid set-off in an action commenced by A. against B. on the 13th of January.

5. MEASURE OF DAMAGES.—*It seems*, that where a contract is broken, by a notice of renunciation, prior to the time for its performance, the damages are such as would have arisen from the non-performance of the contract at the appointed time, subject to abatement in respect to any circumstances that may afford the means of mitigating the loss.

This was an action of assumpsit. Defendant pleaded in defense a breach of lease and amount due thereon as a set-off. Demurrer to the plea.

Hunter & Page, for plaintiff.

Clarkson & Van Schaack, for defendant.

DRUMMOND, J.—The questions involved in this case are of much interest and rather peculiar. The facts seem to be substantially these: That the defendant having in his possession some funds belonging to the plaintiff, was sued by him in an action of assumpsit to recover the amount, and to the declaration filed in the case the defendant alleged as a defense a contract made between him and the plaintiff on the 27th day of June, 1873, by which the plaintiff "representing" (as is interpolated in the original contract) "Messrs. C. A. Chizzola and Company," agreed to rent defendant's theater for two weeks from the 9th of February, 1874, for the Aimée Opera Bouffe Company. By the terms of the lease, the theater was rented to "the said Grau" and "the said Maurice Grau" agreed to pay $2,500 a week, and the further sum of twenty per cent. of the

gross receipts after deducting this $2,500 per week. The $2,500 was to be paid in daily installments of $500 until $5,000 was paid. The twenty per cent. of the gross receipts was to be paid at the end of the engagement. The defendant relies upon the violation of this contract on the part of the plaintiff as a defense to the action.

The peculiarity of the case arises out of the fact that the lease was not to commence until the 9th of February, and this action was instituted by Grau against McVicker on the 13th of January. If, then, the defendant is entitled to the set-off he claims, it is upon the ground that there was a right of action on his part against Grau in consequence of the refusal of Grau to comply with his contract by giving notice to McVicker to that effect before the time when the lease was to operate had arrived.

These being the facts in the case, there are two points made on the demurrer filed to the plea of the defendant. The first is, that Grau was not personally bound by the contract of the 27th of June, 1873, but that he was the agent of other parties, who are themselves liable. I think this position is untenable under the terms of the contract. The only circumstances which show that Grau was an agent, are that it is stated he represents C. A. Chizzola and Company, and when he signs his name, he signs it: "Maurice Grau, representing C. A. Chizzola and Company." But it will be observed that the contract is made with Grau personally. He is the "manager," so named in the contract, for the Aimée Opera Troupe. The language of the contract is, "Maurice Grau, representing Messrs. C. A. Chizzola and Company, manager of the Aimée Opera Bouffe Company;" and the contract states that he, Grau, is to have the privilege of giving a certain number of performances each week, and the contract shows that Grau was himself personally bound by its terms. "The said Maurice Grau, in consideration of the above, agrees

to pay to the said McVicker, or his representatives, the sum of $2500," etc. So that, while he represents certain persons, and is a manager of a particular company, the theater is rented to *him* and he, personally, is to have the privilege of giving performances, and is to pay the various sums of money. Then the words added to the name of Grau in the contract, and also to his signature, indicate nothing more than a description of the person himself, and do not show that these were principals in the agreement, but that Grau himself was the principal with whom McVicker made the contract, and to whom, if it was violated on Grau's part, McVicker could look for the damages growing out of its non-fulfillment.

The second objection as already suggested, that inasmuch as this suit was commenced on the 13th of January, 1874, there was no complete liability on the part of Grau at that time by which McVicker could hold him responsible under the lease, conceding that he had given notice to McVicker before, that he would not comply with its terms, as it was not to begin until the 9th of February, and there was an opportunity for him to retract, or as it is called in the books, a *locus pœnitentiæ*. Some authorities declare that in law there is this *locus pœnitentiæ*, and that a party shall have a chance to recant and say, "I was wrong, but when the time comes I will perform my contract."

Undoubtedly there are authorities which declare that there can not be a breach of contract strictly so-called until the time has arrived when its performance was to commence; and so in this case, there could be no breach of this contract until after the 9th of February, 1874, because that was the date of the commencement of the contract. There are other authorities, however, which hold the contrary; and in the conflict of authority upon the subject, the question is, what is the true rule in cases of this kind? And

the chief importance, perhaps, of this case is that it becomes necessary to determine in the midst of the conflict of authority upon this subject, whether in point of fact, there could be a breach of this contract, properly so-called, so as to entitle McVicker to commence an action against Grau prior to the 9th of February, 1874; and I have come to the conclusion that there may be such breach.

I think that the principles decided in the case of *Hochster vs. DeLatour*, reported in the 20th English Law and Equity Reports, 157, are sound. That was a case where two parties made an agreement with each other by which one was to enter the employment of the other and to perform a contract which was to commence on a day named. The plaintiff in the action agreed to be a courier of the defendant, on the continent of Europe, for a time, commencing on the first of June. Before that time arrived the defendant had notified the plaintiff that he would not perform the contract, in other words, that he did not want him as a courier. Thereupon, before the first of June, the plaintiff commenced an action against the defendant, and recovered, and the question came up before the Court of Queen's Bench, whether the action, under such circumstances, could be maintained. And the unanimous opinion of the court was, that the action was maintainable, and on the ground that, although the time had not arrived when the contract was to commence, still, as the defendant had apprised the plaintiff that he would not perform it, the plaintiff was not bound to wait until the first of June or until the termination of the contract, it being for three months, before he brought the action. He could treat the breach as complete and recover against the defendant on the ground that there was a legal liability on the part of the defendant to respond in damages. And the reasoning in that case, it seems to me, is very strong. It reviews the arguments upon the subject. For example, there

would be just as much reason to say that the action could not be maintained until the first of September as that the action could not be maintained for a breach, prior to the first of June, because there were three months during which the service was to be performed and in one sense it could not be said that there was a complete non-fulfillment of the contract until the three months had expired. And when in that case and in this, the party who had become bound notified the other that he would not comply with his contract, he certainly ought not to complain if the other takes him at his word, for it may make a great difference to him as to what he shall do—as to other contracts he may make, whether or not that contract is binding on him. There are frequent cases where contracts run for years, and it would be unreasonable in such a case to require a party to wait all the time before he could institute an action against the delinquent person for damages. It seems to me that it is the better rule to hold that the party who has refused to perform his contract is liable at once to an action, and that whatever arises afterward or may arise in consequence of the time not having come or not having expired, should be considered in estimating the damages. For instance, if, in consequence of the discharge of a servant, or of the refusal of a person to require or receive any of the service which would take time, the servant has the opportunity of engaging in other employment, that can be shown in mitigation of damages, and one of the objections that occurred to me at the argument, I think, may not have the weight that I then supposed, namely, that the *status* of the parties in relation to the extent of their liability must be considered as fixed when the suit was commenced. That is not so. On the contrary it is competent to show any facts which have occurred subsequent to the commencement of the suit for the purpose of determining the amount of damages which

the party can recover; or, to apply it to this case, the amount of damages which the defendant could set off or recoup. For example, this was the case of a theater leased by the defendant to Grau for a particular time. It may be that in case Grau failed to comply with his contract, the defendant could lease the theater to some one else. Now, if that could have been done, and the violation of the contract on the part of Grau did not prevent the defendant from making the lease, then that may be taken into consideration to determine the amount of damages which McVicker has sustained for the violation of the contract. If, on the other hand, the fact that McVicker entered into this contract in June, 1873, and consequently made all his arrangements upon the hypothesis that the theater was to be used by Grau during the time named in the contract, prevented him from leasing the theater to other parties during that time, and so he lost the rent, there is no reason why Grau should not be responsible for the use of the theater during the whole time, and I have come to the conclusion that the fair result of the authorities upon this subject is that *prima facie* upon the showing of the plea Grau is responsible to McVicker for the amount which he agreed to pay, because the inference would be, that the defendant was prevented from leasing the theater to other parties. It may be, also, that the defendant could, himself, have used the theater during that time. If so, that would be taken into consideration, but I am only considering the question now in its apparent aspect, and I think the plea *prima facie* is good. The language of the plea is, after setting out the contract, that he, the defendant, was ready to comply with all the conditions on his part to be performed, which were in relation to lighting the theater and printing and posting advertisements, and furnishing the orchestra, etc., "that Grau after the contract was entered into and before the 9th day of February, 1874, and before commencing this suit,

to-wit, the 9th day of January, 1874, wholly refused to take, receive, occupy, and rent the said theater of the said defendant for the purpose aforesaid on or from the said 9th day of February, 1874, for the term or time aforesaid or for any other term or time, and wholly refused to perform and fulfill the said agreement on his part, and then and there wholly discharged the said defendant from said agreement and from the performance of the same and wholly and absolutely broke and put an end to his said agreement and engagement, without the consent and against the will of him, the said defendant."

Now, I think that is a complete breach of the contract, and if McVicker instead of being the defendant were the plaintiff, he would be entitled to institute a suit at once against Grau for a breach of the contract although the time of its performance had not commenced. For these reasons the demurrer to the plea must be overruled.

Where one party to a contract refuses to perform, the other party has an immediate right of action, and need not wait for the time of performance. *Cort vs. Ambergate R. R. Co.*, 6 English Law and Equity, 230; *Hochster vs. De Latour*, 20 do. 157; *Traver vs. Halsted*, 23 Wendell, 66; *Francht vs. Leach*, 5 Cowen, 506; *Ripley vs. McClure*, 4 Exchequer, 345; *Danube & Black Sea R. R. Co., etc., vs. Xenos*, 103 English Law and Equity, 152.

See, also, *McPherson vs. Walker*, 40 Illinois, 371, and *Wolf vs. Willits*, 35 do. 89; *Frost vs. Knight*, Law Reports, Exchequer, 114 (in Exchequer Chamber); *Burtis vs. Thompson*, 42 New York, 246; *Crabtree vs. Messersmith*, 19 Iowa, 179; *Hollaway vs. Griffith*, 32 do. 409. [*Reporter.*

KIRK HAWES, Assignee, vs. O. L. MANN *et al.*

Circuit Court — Northern District of Illinois — July, 1876.

In Equity

Conveyances — Femmes Covert — Acknowledgment of Deed — Illinois Act of 1869.—In Illinois, under the act of 1869, it is not necessary that a *femme covert* should acknowledge her deed in order to render it valid.

Bill to foreclose a mortgage. The facts of this case were, that O. L. Mann had subscribed for $20,000 of the capital stock of the National Life Insurance Company, and gave his notes for the full amount, secured by a mortgage on his wife's property. It appeared that she was unwilling to give the mortgage, but finally agreed to do so. Mann then took the mortgage to a notary public, who was his wife's brother, and he entered the acknowledgment in due form, though Mrs. Mann did not appear before him. A bill was filed to foreclose the mortgage, and Mrs. Mann, in her answer, set up the claim that the instrument was invalid, because it had not been properly acknowledged.

George W. Smith, for complainant.

Goudy, Chandler & Skinner, for defendants.

Blodgett, J.—The question is, whether the mortgage was properly executed, so as to be binding on Mrs. Mann. I think this properly comes under the provisions of the act of 1869, which reads as follows:

"Be it enacted, that any *femme covert*, being above the

age of eighteen years, joining with her husband in the execution of any deed, mortgage, conveyance, power of attorney, or other writing of or relating to the sale, conveyance, or other disposition of lands or other real estate, as aforesaid, shall be bound and concluded by the same in respect of her right, title, claim, interest or dower in such estate as if she were sole and of full age, as aforesaid; and the acknowledgment or proof of such deed, mortgage, conveyance, power of attorney, or other writing, may be the same as if she were sole."[1]

Prior to this statute, a *femme covert* could only convey her real estate by acknowledging the deed before an authorized officer, and submitting to an examination separate and apart from her husband. The Supreme Court had repeatedly decided that the act of 1861 did not relieve her from that disability, and that she was still required to appear and be examined before an acknowledging officer as to her willingness to convey. The present law places the wife on the same footing with her husband. If, therefore, the mortgage had been given by Mann and his wife without acknowledgment, it was competent to prove the signature of both, and the instrument would be valid. It is no more necessary that a married woman should acknowledge than that a married man should, in order to make a valid deed. The same proof that would bind the husband will bind the wife. The statute was intended to give a married woman full and complete control over her property, and place her on the same footing as a *femme sole*. She might acknowledge it as if she was unmarried, and the signature could be proven against her the same as though she were so. The evidence shows that she had delivered it to her husband, and he in turn delivered it to the company, and she is bound thereby. A decree will, therefore, be rendered in favor of the complainant.

[1] Illinois Public Laws 1869, 359.

THE WOVEN WIRE MATTRESS COMPANY vs. JOHN E. WHITTLESEY *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JULY, 1876.

IN EQUITY.

1. PATENT—SPIRAL SPRING BED—PRIOR USE OF ARTICLE.—A claim or device for making a bed bottom of spiral coils, or wire coils interlaced or interlocked, so as to form a fabric, fastened in any form to the sides of the bedstead frame: *Held*, not patentable, because the same device was in general use for analogous purposes prior to the application for the patent.

2. DEFINITENESS OF DESCRIPTIONS IN FOREIGN PUBLICATIONS TO DEFEAT PATENT.—Though it is the settled law in this country that the description in foreign publications, in order to defeat a patent in this country, should be sufficiently definite for a person of ordinary skill to construct the machine from such description in the foreign publications, yet where such descriptions are fully as definite as the specifications in the application for the patent in this country, that will be sufficient to defeat the patent.

3. BEDSTEAD FRAME.—The Farnham patent for a new and improved bedstead frame, sustained.

Goodwin, Offield & Towle, for complainant.

Coburn & Thacher, for defendants.

BLODGETT, J.—This is a bill for injunction and damages upon an alleged infringement of patents owned by the complainant company. The patents are: *First*, A patent issued November 5, 1861, to Herman Stube, as assignee of O. A. A. Rouillion, for an improvement in bed bottoms, and by Stube duly assigned by legal conveyance to the complainant. The second is for a patent issued to the complainant as assignee

of J. M. Farnham, dated November 30, 1869, for an improved bedstead frame.

The answer denied that Rouillion was the inventor of the improvement described in the patent of November, 5, 1861, and sets forth various prior devices and prior knowledge and use of the same device, and also denies the infringement of either of the complainant's patents.

The Rouillion patent, which is the foundation of the complainant's claim, is, broadly, for making a bed bottom of spiral coils, or wire coils interlocked, so as to form a fabric, fastened in any form to the sides of the bedstead frame. The patentee sets forth in his specification that he has invented a new and improved spring bed bottom. "The invention consists in constructing a bed bottom of a series of spiral springs, connected together and forming one or more layers."

The claim in the patent is "for an elastic bed bottom, constructed of a series of spiral springs interlocked or connected together to form one or more layers one over the other, and attached to a suitable frame, substantially as shown and described,"

It will thus be seen that this patent is, broadly, for the device of making a bed bottom of this elastic fabric — these spiral coils interlocked or connected together so as to make a fabric. The method of fastening or adapting it to the frame forms no part of the patent, but it is, broadly, for this simple device of using this fabric for a bed bottom.

The Farnham patent is for a new and improved bedstead frame. The invention, as the inventor says, relates to a new frame for single or double bedsteads, which are provided with elastic and flexible sheets for the support of the bed, with suitable bed bottoms. The invention consists in the use of double inclined end-bars, to which the end of the fabric is clamped, and in the employment of longitudinal

and adjustable standards to which the end pieces are secured. By this arrangement the fabric is securely held, and can be stretched and slackened at will.

These end pieces, it will be seen, incline so that the fabric does not rest upon the end pieces at all, but strains continuously from the point where it is fastened without binding, so to speak, across the end pieces. The end piece is beveled or sloped. The standards referred to are provided with slots, so as to permit the stretching of the fabric as occasion may require.

The patentee was allowed two claims: *First*, "The inclined double end-bars of the bedstead, arranged substantially as and for the purposes herein shown." *Second*, "The standard 'B.' arranged longitudinally, and adjustable on the side-bars to the bed frame, to permit the inclined side-bars to be set a suitable distance apart, as set forth," so that by these ears or standards, as he calls them, the position of the end-bars can be changed so as to tighten the bed bottom.

It will be seen that the first patent broadly claims, as I have stated, an elastic bed bottom consisting of a series of spiral springs interlocked or connected together, and attached to a suitable frame. It does not specify any particular mode of attaching the fabric to the frame, but the idea is, a patent for using a fabric made of spiral springs interlocked or connected together for a bed bottom. The specification states that more than one thickness or layer of the fabric may be used, but that does not vary the main feature, which is for a bed bottom formed of this elastic fabric.

The proof shows that this fabric has been known and in use in this country since 1852. In 1851 or 1852, John T. Wickersham, then of New York City, made a fabric of this kind, and used it for the bottoms and backs of chairs, and subsequently used it for the bottom or bed part of sofa beds, and that continuously, from the time this fabric was

introduced by Wickersham, forward, the fabric formed by these elastic or spiral coils, interlocked so as to make a sheet or fabric, was well known in the art of wire working in this country.

Mr. Wickersham, at page 25 of the defendants' testimony, says:

Q. "How was this coiled wire work made?

A. "The coiled wire was wound upon a mandrel with a handle at one end of it, and four or five wires, more or less, were placed side by side and wound around the mandrel, and the mandrel turned and the wire wound around that. After the coils were completed, the coils were cut in continuous lengths, and the wires were slipped off the mandrel and separated after the coils were taken off the mandrel. After the coils were separated, the coils being in a screw shape, one coil was screwed into the other, according to the length or size of the mandrel. I experimented with machinery, but never made much progress from the hand way of making it, and gave it up as to making it with machinery."

The proof also shows that Wickersham published pamphlets or catalogues containing descriptions of his manufacture, from time to time, and also containing cuts or illustrations of chairs and sofas made of this coiled fabric, copies of which are put in evidence.

So, too, the witnesses, Thomas Robinson, and J. Armstrong, who were workmen for Wickersham, and Walker, who was subsequently a manufacturer in Philadelphia, of the same class of goods, all testify not only to the manner of the manufacture of the fabric, but also to the use of it as described by Mr. Wickersham and by Mr. Walker. So, also, Mr. Walker of Walker & Sons, Philadelphia, shows that this fabric was from 1851 or 1852 known as a fabric in the art of wire working and making of wire furniture. It had never been used exactly for a bed, but it had been used, and was

used before 1861, for the making of a cot bedstead, not like complainant's exactly, because the coils were larger, but the idea was a cot bedstead, of this fabric with these coils for the bed bottom. In 1851, 52 or 53, Wickersham made sofa bedsteads, the back and ends of which were of this fabric. One end was so adjusted that it could be let down and form part of a bed bottom, so that when this sofa was made into a bed, part of the bottom was constructed of a series of spiral springs "*interlocked and connected together.*" So that we have the history of the art up to the time this inventor entered the field, showing this fabric used for many analagous purposes to that of a bed bottom—that is, it was used for chair bottoms, and it was used for chair backs; it was used for cot bedsteads, and it was used for the back, ends, and part of the bottom of a sofa bedstead. At about the same time, other inventors had been experimenting to some extent, in the same direction. In 1853, Demure & Mauratz had obtained a patent for a bed bottom constructed by a combination of longitudinal and transverse wire coils, with vertical coil springs in the manner shown in the drawing attached to their patents. In 1854, one Mereweather had obtained a patent for constructing a bed bottom of bent wire—that is, wires bent into short kinks so as to give them a certain degree of elasticity and running parallel across the bottom of the bed frame, making a bed bottom of elastic material. In 1856, one Lysander Spooner obtained a patent for a bed bottom constructed of spiral coils run transversely across the frame, parallel to each other, but not interlocked; that is, he makes his coils large enough and strong enough, and puts them close enough together to bear whatever weight is intended to be borne by the bed bottom. He does not give any specific directions as to how many coils are to be used, but his plans show that they are strung across the bed transversely, nearly touching each other, but the coils are not

interlocked. We have then the use of elastic coils fabric by Wickersham and Walker for purposes analogous to that called for by the Rouillion patent; then from 1853 up to 1856, other inventors had made bed bottoms of elastic wire, used longitudinally and transversely across the bedstead frame so as to make an elastic bed. They did not use the coiled wire fabric which was used by Wickersham and Walker. It will be remembered that Wickersham states that he called his furniture French furniture, because he made it like certain French furniture which had been imported about that time into this country.

This is all the evidence we have of any French device like this for the purpose of furniture. There is no evidence taken from any of the publications of France, or any evidence of any public or notorious use there. But there is evidence taken at a late stage in the history of this case, which shows that from 1855 forward, one Spyer, doing business in Berlin, Germany, made a bed bottom, which he was at that time engaged in introducing, and advertising for use in hospitals and places where sick people were being treated, made of the same interlocked woven wire—he calls it "spiral weaving," in his description, and the evidence from public documents, books and publications made in Germany in July and August, 1861, the same year that this patent was issued or applied for by Rouillion, shows that Mr. Spyer was exhibiting his invention, and making it public in every method that he could by advertising throughout Germany, showing the advantages of this kind of a bed as an invalid bed. We find in the proof various cuts and drawings, exhibitions and advertisements of it taken from German publications of that date showing that this fabric was well known and in use as a bed bottom there at that time.

We then have, so far as the Rouillion patent is concerned, what I have already said in reference to the art in this

country up to the time that Rouillion entered the field, and the further facts that this fabric had been made and used in Germany, and had been described in printed publications in that country prior to the time that the Rouillion invention is claimed to have been made in this country.

The proof in the case also tends strongly to show that the idea of making and patenting this fabric in this country for the purposes of a bed bottom was suggested to Rouillion by Stube, who was Rouillion's father-in-law, and that Stube had then but lately emigrated to this country from Germany, where he might have seen the Spyer bed or published descriptions of it.

I am, therefore, fully satisfied, from the testimony in the case, that the broad claim of Rouillion in this patent for the idea of making a bed bottom of elastic wire fabric made from spiral coils interlocked with each other, can not be allowed, and that this patent for the fabric must be held void for want of novelty.

It is objected by the plaintiff, that the manufacture by Wickersham and Walker of the sofa-bed and cots was only an experiment. Both these witnesses testify that they made these cots and made the sofa bedstead, but they did not sell any. I think, perhaps, the weight of testimony shows that they sold, or gave away one. They were for sale—exposed for sale in their stores; they were publicly exhibited and advertised, but no one was inclined to buy them. I think from the proof one was used by the family in Philadelphia, for a servant's bed or cot. The use, however, was not very general. It is contended, on the part of the plaintiff, that this was, therefore, only an abandoned experiment; and, were it not for the foreign testimony in regard to the foreign use, it might be possible that the court would feel compelled to sustain the Rouillion patent upon the ground that these were mere experiments approximating towards the use which

Rouillion finally adopted for this fabric; but when this testimony of Wickersham, Walker and Robinson is supplemented by the testimony of Spyer, I think there can be no doubt but this was an old art at the time of the Rouillion patent.

There is one further objection that is urged to the foreign testimony which I ought to notice, and that is, that the law requires that the description in foreign publications in order to defeat a patent in this country should be sufficiently definite so that a person of ordinary skill could construct the machine from the descriptions in the foreign publications.

That is, undoubtedly, the settled law in this country. But it will be noticed that Mr. Rouillion gives no description of how to construct the fabric. He seems to accept the fabric as old. Spyer, in his advertisements of his bed bottom in Germany, describes it as made of "spiral weaving." It seems to me as though that is about as definite a description as the description given in the Rouillion patent of spiral coils interlocked with each other. One is "spiral weaving" and the other is "spiral coils interlocked or connected." Rouillion seems to assume that the fabric was well known, or that the method of making the fabric by interlacing or interlocking spiral coils was known, and does not deem it necessary to describe how to do that, but accepts the art as already accomplished up to that point. So, that, I think, when the writer in Germany tells us to make an elastic wire bed bottom of "spiral weaving," he has given us as good a description, and given us as much information as Rouillion did in his patent obtained in 1861.

We come now for a moment only, to the consideration of the Farnham patent. There is no evidence of any prior use of the inclined end pieces in the construction of any kind of a bed bottom, nor is there any evidence of any prior use of this standard "B."; and the evidence in this case shows con-

clusively that the defendants do use the inclined end pieces, and have used the standard. So far, therefore, as they have used the end piece, and the standard described in the Farnham patent, they have infringed and should be so far enjoined.

The conclusion then is, that the defendants are not liable for using the coiled wire fabric for making the bed bottom, but they do infringe so far as they use the specific elements in the frame patented by Farnham.

GEORGE HUME, Administrator, Etc. vs. THE PITTSBURGH, CINCINNATI & ST. LOUIS R. R. Co.

Circuit Court—District of Indiana—August, 1877.

1. Service on Corporation.—Service upon a corporation in order to bring it into court must be made under the United States, not under a State, Statute.

2. Domicile of Corporation.—A corporation, being the creature of local law, dwells only within the territorial boundaries of the sovereign or State which creates it, and it cannot be an inhabitant of another State.

3. Under the Act of Congress of March 3, 1875, which declares that, "No civil suit shall be brought against any person by any original process in any other district than that whereof he is an inhabitant or in which he shall be found," a corporation can not be served by process outside of the State where it was created.

4. Service on Agent outside of State.—The presence of an agent of a foreign corporation is not the presence of the corporation within the meaning of the act.

George Hume, administrator of the estate of Mary E. Hume, deceased, a citizen of Indiana, sues the Pittsburgh, Cincinnati and St. Louis Railroad Company, a corporation

organized under the laws of Ohio and operating a line of railway between the city of Columbus, Ohio, and the city of Indianapolis, Indiana, for damages resulting from negligently running its cars over and killing the said Mary E. Hume, his wife.

The summons was served by the marshal by reading and delivering a copy to J. A. Perkins, the defendant's agent at Indianapolis; the defendant appears specially by counsel and moves to quash the service of the process.

Dye & Harris, for plaintiff.

Baker, Hord & Hendricks, for defendant.

GRESHAM, J.—There are provisions in the statutes of Indiana requiring a foreign corporation, wishing to do business in this state, to consent by a resolution of its board of directors that it may be sued in the courts of this state, and that service on its agent found within the state shall be valid service on the corporation.[1]

Section 1 of the Act of Congress, approved March 3, 1875, 18 U. S. Statutes at Large, 470, declares that "no civil suit shall be brought against any person by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found." To this extent there is no difference between the Act of 1875 and the Judiciary Act of 1789.

If the service on the agent brought the defendant, a foreign corporation, into court, it was by virtue of Section 1 of the Act of 1875, and not under the statutes of Indiana.

This is a civil suit brought against an Ohio corporation by original process. A corporation being the creature of

[1] 2 Davis' R. S. 45, 46 and 281, and 1 do. 873.

local law, dwelling only within the territorial boundaries of the sovereign or state which creates it, it follows that the defendant is not, and cannot be, an inhabitant of this state.[1]

Was the defendant "found" within this district when the summons was served on the agent?

The act of Congress requires that the defendant, and not the defendant's agent, should be found within the district. The presence here of the agent of a foreign corporation is not the presence of the corporation, within the meaning of the act, any more than the presence of the agent of a natural person, a citizen of another state, is the presence of the principal. It does not follow that because the law of comity allows a corporation by its agents to transact business and enter into contracts beyond the limits of the state which brings it into being, that the corporation itself, like a natural person, may be found in a state other than that of which it is a citizen. In the *Bank of Augusta vs. Earl*,[2] Chief Justice TANEY, in delivering the opinion of the court, said: "But although it must live and have its being in that state only (the state of its creation), yet it does not by any means follow that its existence there will not be recognized in other places. * * * Now, natural persons through the intervention of agents, are constantly making contracts in countries in which they do not reside, and where they are not personally present when the contract is made, and nobody has ever doubted the validity of these engagements. And what greater objection can there be to the capacity of an artificial person, by its agents, to make a contract within the scope of its limited powers in a sovereignty in which it does not reside, provided such contracts are permitted to be made by the laws of the place?" And in *Paul vs. Virginia*,

[1] *The Bank of Augusta vs. Earl*, 13 Peters, 584

[2] 13 Peters, 584.

8 Wallace, 181, the court says: "The corporation being the mere creature of local law, can have no legal existence beyond the limits of the sovereignty where created."

It is too plain for argument that a corporation can not be found where it can have no legal existence.[1]

The statutes of Indiana, relied on by the plaintiff, do not proceed upon the idea that the presence of the agent of a foreign corporation is the presence of the corporation itself. By contract between the state and the foreign corporation, service on the local agent is made as effectual as service on the corporation itself. This legislation, in effect, concedes that a foreign corporation can not be found within the state.

If the Legislature meant to declare that the presence of the agent of a foreign corporation was the presence of the corporation itself, it was quite unnecessary to require the corporation to agree that service on the agent should be equivalent to service on itself.

But, as already stated, the question before the court must be decided on the terms of Section 1 of the Act of 1875.

The motion to quash the service is sustained.

See *Wilson Packing Co. vs. Hunter, post*, page 429, and cases cited in the note. [*Reporter.*

[1] *Pomeroy vs. New York Railroad Co.*, 4 Blatchford, 120; *Stillwell vs. Empire Fire Insurance Co.*, 4 Central Law Journal, 468.

In re SAUTHOFF & OLSON.

DISTRICT COURT—WESTERN DISTRICT OF WISCONSIN—AUGUST, 1877.

IN BANKRUPTCY.

1. PARTNERSHIP—DISSOLUTION—FIRM DEBTS.—A partner withdrawing firm assets, upon dissolution, as his interest in the partnership, takes them subject to the rights of the firm creditors, if the fund remaining is insufficient for the payment of their debts. This is true even though no fraud is intended, and the partners believed the remaining assets to be ample.

2. CREDITORS CAN FOLLOW FIRM ASSETS THOUGH CONVERTED INTO HOMESTEAD.—If the retiring partner invest the assets thus withdrawn by him, in a homestead, a court of equity will compel its surrender for the benefit of the creditors.

3. SUBSEQUENT DEALINGS OF THE CREDITORS, with the remaining partner, and sales and credits by them do not estop them from enforcing their claim against the assets withdrawn.

The facts in this case were as follows:

Sauthoff and Olson were copartners, doing business at Madison, Wisconsin, as dealers in clothing. The copartnership was formed in 1865, and the parties continued in business until January 27, 1876, when Sauthoff purchased from Olson his interest in the business, and the firm was dissolved.

From the testimony it appeared that there was about the same quantity of goods in the store at the time of the dissolution as at the time of bankruptcy. The outstanding accounts due the firm at the time of dissolution, on their face, amounted to about ten thousand dollars. Their liabilities then due, and to become due, were a little over nine thousand dollars, of which amount about six thousand dol-

lars remained unpaid when the petition in bankruptcy was filed.

By the terms of dissolution, Sauthoff was to pay Olson for his interest in the property and business six thousand five hundred dollars, and the transaction was consummated by the payment to Olson in cash of one thousand dollars, the execution by Sauthoff to Olson of two notes, one for one thousand dollars, and the other for one thousand eight hundred and fifty dollars, and by the further delivery to Olson of a portion of the book accounts of the firm, such portion so delivered amounting to two thousand six hundred and fifty dollars on their face. Sauthoff assumed the firm debts and continued the business, making some additional purchases of goods, and incurring new liabilities therefor.

In April, 1876, but little more than two months subsequent to the dissolution, Sauthoff was unable to meet his liabilities, which included such as remained unpaid of the late firm, and sought a compromise with his creditors, offering them thirty cents on the dollar. Subsequently, and within a short time, bankruptcy proceedings were commenced against Sauthoff & Olson. Previously, and in March, 1876, Olson had purchased a homestead. He had also collected about one thousand four hundred dollars in money from the outstanding accounts turned out to him by Sauthoff at the time of the dissolution of the firm. A portion of this money, together with the one thousand dollars which Sauthoff had paid him in cash, was used by him in partial payment of the purchase price of the homestead. The remainder of the accounts in his hands, uncollected, and amounting to about one thousand two hundred and fifty dollars, he, subsequent to the bankruptcy, on demand, delivered to the assignee.

The stock in trade in the hands of Sauthoff, at the time of the bankruptcy, was subsequently sold by the assignee

for about eight thousand two hundred dollars. From the accounts and demands which came to the assignee he collected about one thousand four hundred dollars.

The assignee, in behalf of creditors, by the present proceeding seeks to reach the one thousand dollars paid in cash at the time of the dissolution by Sauthoff to Olson, and also the sum of one thousand four hundred dollars collected by Olson upon the book accounts, which he took on the transfer of his interest to Sauthoff, and to charge the homestead property of Olson, acquired as before stated, with the payment of so much of these amounts as were expended in the purchase of that property, it being claimed on the part of the assignee that the dissolution of the copartnership and the payment by Sauthoff to Olson of the one thousand dollars, and the delivery to the latter of a portion of the book accounts of the firm, operated as a fraud upon creditors, and that Olson should restore to them what he thus received. No payment had been made to Olson by Sauthoff upon the notes for two thousand eight hundred and fifty dollars, given upon the termination of the copartnership.

H. M. & H. A. Lewis, for assignee.

Vilas & Bryant, for bankrupt Olson.

Dyer, J.—In a case where a copartnership which is indebted has been dissolved, the retiring partner withdrawing, on transfer of his interests, a portion of the assets or capital, and the transaction being followed at a not remote period by the insolvency of the member assuming the debts and continuing the business, it is the duty of the court, when called to consider the rights and liabilities of the parties, to look cautiously into the facts, with a view to the discovery of any possible fraud, and the correction of any wrong that may have resulted to creditors.

The principle is elementary that in equity, partnership creditors have an absolute priority of claim upon the partnership property for the payment of their demands, and that the interest of each individual partner is his share of the surplus after payment of the partnership debts. To such an extent has this rule been carried, that it has been held that where a partner sells his interest to a stranger, or it is sold upon execution against him, his right to have the partnership debts paid, and his liability therefor discharged out of the property, are not divested by the sale, and that such a sale gives to the purchaser only such an interest in the assets as may remain after the payment of partnership debts.[1] The sale of partnership property by one of a firm of commercial partners on the eve of his insolvency will be set aside.[2]

The appropriation by an insolvent firm of partnership property to the payment of the individual debts of one partner is not simply void, but is fraudulent, and avoids the deed of assignment.[3]

Admitting the full force of these principles, it is also true that they are not so enforced as to operate against or affect a dissolution of copartnership made in good faith, and which is unaccompanied by any improper withdrawal of assets beyond the reach of creditors.

"The right of copartners upon dissolution to transfer the joint property to one of the firm is clear and unquestionable. The effect of such a transfer as between the partners, is to vest the legal title to the property in the individual partner, with a right to use and dispose of it as his separate estate.

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[1] *Menagh vs. Whitewell*, 52 New York, 146; *Osborn vs. McBride*, 16 National Bankruptcy Register, 22.

[2] *Saloy vs. Albrecht*, 17 Louisiana Annual, 75.

[3] *Wilson vs. Robertson*, 21 New York, 587.

* * * If in such transfer there is no fraud and collusion between the copartners, for the purpose of defeating the rights of the joint creditors, and the transaction is made in good faith upon dissolution, and for the purpose of closing the affairs of the partnership, the joint property thereby becomes separate estate, with all the rights and incidents, both in law and equity, which properly attach thereto."[1]

These are principles applicable to a case where one partner retires and the other takes the entire property and assets; and they are substantially reiterated in *Sage vs. Chollar*, 21 Barbour, 596, and in *Waterman vs. Hunt*, 2 Rhode Island, 298. See, also, *Dimon vs. Hazard*, 32 New York, 65. Where, however, the circumstances of the case show that the dissolution of the partnership is a fraud, as if it be an incident to a scheme for giving one creditor a preference, or for enabling a member of the firm wrongfully to appropriate assets which should be applied in payment of partnership debts, or where the conversion of joint into separate assets is a result contemplated, and is the motive, or one of the motives of the act of dissolving the firm, the act may be avoided by the joint creditors.[2]

The correctness of the ruling in *In re Boothroyd & Gibbs*, 14 National Bankruptcy Register, 223, cannot be questioned, namely: "That the purchase by an insolvent trader of a homestead upon the eve of bankruptcy with knowledge of his insolvent condition and for the purpose of placing the property beyond the reach of process, is a legal fraud, which no court should hesitate to hold void as to creditors." Advancing a step further, where a copartnership is insolvent, or is possessed of assets not more than adequate for the payment of debts, one member of the firm cannot, upon retiring, right-

[1] *Howe et al. vs. Lawrence et al.*, 9 Cushing, 555.

[2] *In re Waite & Crocker*, 1 National Bankruptcy Register, 373.

fully withdraw beyond the reach of creditors and to their injury a portion of the assets or property, and make a personal appropriation of those assets by putting them in the shape of a homestead.

Under such circumstances, though it takes the form of a homestead, the property is as much within the reach of a court of equity as before; and no such change in its form or character can give it new sacredness or endow its possessor with new privileges in its ownership or use.

Keeping in view the principles thus stated, the question now is, whether upon the facts, the transaction between Sauthoff & Olson is one which must be condemned as a fraud in fact or law upon their creditors.

Without referring in detail to the circumstances bearing upon the point, it may be first stated, that the evidence does not show that there was any actual intended fraud in the act of dissolution. Although the interest of the retiring partner, based upon the estimated value of their assets, was greatly exaggerated, I think the intent of the parties in dissolving their business relations, as disclosed by the testimony, was honest, and that positive bad faith is not to be imputed.

Admitting this to be true, the question still remains, whether their actual pecuniary condition was such as to justify the withdrawal by Olson of the assets which were taken by him when the partnership was dissolved. The amount so withdrawn was two thousand four hundred dollars. He took two thousand six hundred and fifty dollars in book accounts. Of these he collected one thousand four hundred dollars, and returned the balance to the assignee. It is true that the one thousand dollars paid him in cash by Sauthoff was then raised by loan or pledge, as collateral security, of a mortgage on Sauthoff's homestead, held by his brother. But, subsequently, the holder of that mortgage as such security, having obtained judgment against Sauthoff for the one

thousand dollars, it was held by this court that Sauthoff's brother, as the assignor of the mortgage, stood in the position of a surety, and was entitled as such to protection; and there having been an execution levy under the judgment upon Sauthoff's stock, it was ordered that the one thousand dollars be paid in full from the general fund; so that ultimately it came from the assets of the concern and to that extent in fact diminished them. Now, the question is, keeping in view the rights of creditors, was the actual pecuniary condition of this firm such as to entitle the retiring partner to appropriate the amount of their assets which he in fact received, and to place them in the form of exempt property?

In settling this question, the principle we must apply is, that if a retiring partner takes out a portion of the assets of the firm for his individual use, he must do so without impairing the fund to which the creditors have the right in equity to look for payment; and it must be made clearly to appear that such remaining fund is ample. If such partner receives more than his interest in the surplus after payment of the firm indebtedness, equity must treat it as a wrong to creditors, and this equity cannot be avoided by the fact that the partners believed that enough remained to pay the partnership debts, if, in fact, after making such appropriation in favor of one or both partners, the remaining assets prove insufficient.

The results to be reached one way or the other in this case, depend, of course, upon what shall be the determination as to the sufficiency of the assets of the firm left by Olson for the payment of the partnership debts. On their face, the book accounts of the firm amounted to between nine thousand and ten thousand dollars, and this was the value placed upon them by the parties. But that they erred greatly in judgment is demonstrated by the fact that only about two thousand eight hundred dollars of the accounts have thus far

proved of any value, and of this amount the assignee has received about one thousand four hundred dollars, the bankrupt Olson retaining the balance. What further moneys may be derived from such of the accounts as are uncollected is not now known.

Concerning the value of the stock of goods of which the parties were possessed at the time of the dissolution, it is quite impossible upon the present testimony to arrive at a satisfactory conclusion. Complications in this connection arise, because of the fact that no distinction has been preserved in the bankruptcy proceedings between the debts of the firm and those incurred by Sauthoff subsequently to the dissolution. Goods purchased by Sauthoff on his individual credit were mingled with the original stock, debts were paid by him from the common fund, without regard to those contracted by the firm and those contracted by himself; the sale made by the assignee included goods on hand at the dissolution and those purchased subsequently, and, so far as distribution has been made, no distinction has been observed between the firm creditors and the subsequent individual creditors of Sauthoff.

Of course, no part of the moneys which it may be determined Olson should restore can rightfully be used in the payment of individual liabilities incurred by Sauthoff subsequently to the dissolution. And in view of the necessity of ascertaining with accuracy the value of the assets of Sauthoff and Olson at the time the copartnership was dissolved, I shall direct a further reference to take testimony upon that question. Having settled the principles upon which the rights of the parties are to be determined, upon the coming in of that testimony it can be ascertained what amount, if any, should be restored to the fund by Olson for application upon the partnership indebtedness.

It has been urged by counsel for respondent, that, by their

course of dealing with Sauthoff, selling him goods, giving him fresh credit and permitting such goods to be mingled with the old stock, the creditors must be held to have ratified the transaction between Sauthoff and Olson, and are now estopped from asserting a claim upon the property withdrawn by the latter from the assets of the firm. But it cannot be claimed that the action of the creditors operated to release Olson from liability for the firm indebtedness, and I fail to see how their subsequent dealing with Sauthoff so far sanctioned the appropriation by Olson of the moneys he took out of the firm as now to deprive them, if it shall be found that the remaining assets were insufficient to pay their debts in full, of the right to follow those moneys.

The present order will be, that the case be referred to the register to take testimony and ascertain what was the fair actual value of the assets of the firm of Sauthoff & Olson at the time of the dissolution of that firm, the value of the stock in trade, fixtures and book accounts to be separately stated; also, to ascertain what proportion of the stock of goods sold by the assignee was held by the firm at the time of dissolution, and what was the amount and value of the goods purchased by Sauthoff on his individual account subsequent to the dissolution.

SARAH W. GREGORY vs. ENOCH MARKS.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—AUGUST, 1877.

DECLARING NOTE DUE UNDER CLAUSE IN TRUST DEED.—Where a clause in a trust deed provided that the indebtedness secured thereby was to become wholly due and payable in case of default in the payment of interest, the note and trust deed, being contemporaneous instruments, must be construed together, and if default is made in payment of interest, the whole indebtedness becomes due, and the holder of the note may pursue the maker of the note by a personal judgment after exhausting the securities.

This case was submitted to the court upon an agreed statement of facts, which are, that on May 1, 1874, the defendant, Enoch Marks, borrowed of Ann Y. Boardman the sum of $12,500, for the term of five years, with interest at ten per cent. per annum, payable semi-annually; that the said defendant, Enoch Marks, executed his promissory note for said debt, a copy of which is given in the stipulation, and certain interest coupons; that accompanying said principal note were ten interest coupons for the sum of $625, each payable, etc.; that the said defendant, Enoch Marks, and Margaret A. Marks, his wife, at the same time, and contemporaneously with the execution of said note, executed and delivered their trust deed, dated May 1, 1874, to Willis G. Jackson, trustee, conveying certain property as security for the payment of said debt; and in said deed of trust it was provided that in case of default in any of the said payments of principal or interest, according to the tenor and effect of the said promissory notes, or either of them, or any part thereof, or of a breach of any of the covenants or agreements therein by the

party of the first part, his executors, administrators or assigns, then in that case the whole of said principal sum thereby secured, and the interest thereon to the day of sale, might, at the option of the legal holder thereof, become due and payable, and the said premises be sold with the same effect as if said notes had matured.

It is further stipulated, that the said Ann Y. Boardman, for value received, assigned the said principal and interest notes to the plaintiff; that subsequently said defendant made default in the payment of interest due on May 1, 1876, and the premises were sold by the trustee, and there was a balance left unpaid, for which this suit is brought.

Lyman & Jackson, for plaintiff.

H. S. & F. S. Osborn, for defendant.

BLODGETT, J.—The only question in the case is whether the party can maintain a suit at law for this balance upon this note.

The note, on its face, is not yet due; but by the terms of the trust deed, the indebtedness secured by the note was to become wholly due and payable in case of default in the payment of interest. This stipulation is found in the trust deed, which was contemporaneous with the note, and must be deemed a part of the same contract with the note.

Something like a year ago I had a kindred question to this before me, and having in mind a Missouri case which I had read a few months before that, upon the same question, I refused to render judgment at first, although subsequently, as there was no defense made, I allowed the plaintiff to take judgment.

On looking up the Missouri case, which was in my mind, I find, however, that so much of the case as appeared to bear on this case is really *obiter*.

The case there was this—A. made a mortgage upon certain real estate, or rather gave his note, and to secure the payment of the note, gave a mortgage upon certain real estate, and in the mortgage covenanted that in case of default in the payment of interest, the whole debt should become due and payable. A. sold and conveyed the mortgaged premises to B. Default was made in the payment of the indebtedness, and B. being in possession of the mortgaged premises, the mortgagee filed a bill against A., the original mortgagor, and B., the grantee of the mortgagor, making them both parties to the foreclosure proceeding, and the court rendered a judgment of foreclosure, and ordered the premises to be sold, and on the coming in of the report of the commissioner making the sale, there being a deficiency, rendered a personal judgment against the purchaser of the equity of redemption as well as against the original mortgagor and the promissor in the note which was given.

On error to the Supreme Court, taken in behalf of the purchaser B., this opinion was given, to which I have referred; and in the course of its discussion of the question, the Supreme Court say: "The clause in the trust deed is only put there for the purpose of marshaling the security, and not for the purpose of maturing the note for any other purpose than that of applying the securities."

It was not necessary that the court of Missouri should decide that point, for the purpose of disposing of the case before it, because the only question there was whether they had the right to take a personal judgment against the purchaser.

The law is well settled in this state, that where two contracts, relating to the same subject matter, are made at the same time, they form but one contract, and are to be construed together; and I know of no reason why any exception to the rule should be applied to the case before me.

The question is, does this note and trust deed, when taken together, make the note become due at an earlier day, in the happening of certain contingencies, than the note alone upon its face requires, or would allow; and I am of opinion that it does; that the two contracts are to be construed together, and that when construed together, if default is made in the payment of interest, the whole indebtedness becomes due, and that the holder of the note may pursue the maker of the note by a personal judgment, after exhausting the securities.

I shall therefore render judgment in favor of the plaintiff.

HENRY M. STOW vs. CITY OF CHICAGO.

CIRCUIT COURT — NORTHERN DISTRICT OF ILLINOIS — SEPTEMBER, 1877.

IN EQUITY.

WOODEN PAVEMENTS—NICOLSON'S AND STOW'S PATENTS CONSTRUED.

1. PATENT LAW.—A principal is not liable for the claim of a patentee under work done by a contractor who held a license, even though he has not paid his license fees or royalty.

2. DESCRIPTION.—If a device in use will perform a certain function or office, it is immaterial whether the patentee describes such performance, or even knew that it would so operate.

3. WEDGE-SHAPED BLOCKS.—The use of wedge-shaped blocks in making a pavement is not patentable; that being the principle long since applied in laying cobble stone pavements.

4. UNIFORMITY OF SPACING, and the use of a strip to secure the same in laying a pavement, is not patentable.

5. CHANGE OF MATERIAL.—A mere change of material, as from stone to wood, or *vice versa*, is not patentable.

6. MATTER OF JUDGMENT.—Mere matter of judgment as to the amount of force to be used, is not patentable.

7. ENGLISH PATENTS.—An English patent is a matter of public record in that country, and also in this country, by patent and by publication.

8. OMISSION OF AN ELEMENT from a patent, so that the less number of parts will perform all the functions of the greater, is not an invention.

9. DEGREE OF FORCE, in ramming or swaging is not patentable.

10. Sundry patents and processes for pavements commented upon.

Carter, Becker & Dale and *J. N. Jewett*, for complainant.

West & Bond, for defendant.

BLODGETT, J.—This is a bill in equity, charging the defendant with an infringement of four patents issued by the United States, and praying an account for damages and an injunction.

The patents described in the bill are:

First—A patent dated December 10, 1867, and number 72,110, issued to the complainant, and re-issued January 19, 1869, re-issue number 3,274, for an improved pavement.

Second—Patent dated February 25, 1868, number 74,862, issued to the complainant for an improved street pavement.

Third—Patent dated April 6, 1869, number 88,765, issued to D. L. DeGolyer, for an improvement in laying down block pavements, and of which complainant claims to be assignee.

Fourth—Patent dated December 31, 1872, number 134,404, issued to the complainant for an improvement in wood pavements.

The defendant denies any infringement, and also denies the novelty of the alleged improvements claimed in the patents.

The patent issued December 10, 1867, and re-issued January 19, 1869, is for a pavement composed of alternate tiers of square ended and wedge-shaped blocks, the latter, that is,

the wedges, being driven down into the foundation bed of sand or earth; also, a pavement composed of blocks with the lower ends all wedge-shaped, and all driven or rammed down into a foundation of sand or earth.

From the proofs in this case it appears that the complainant has been paid for all the pavement in which this device has been used, except a block on Market street, between Randolph and Lake, and the intersection of Lake and State streets, which were laid as samples under the direction of the complainant and his brother, W. H. Stow. There were some of these pavements put down on Clark street, but Mr. McBean testifies that he did this under a license from the complainant, and the defendant was not to be liable therefor. He states that he has not yet paid Stow, but that does not make the city liable. It, therefore, hardly seems necessary to consider this patent, but if deemed material to do so, I would be of the opinion that this patent was anticipated in part by an English patent issued to Stead in 1839. In 1839 David Stead received a patent in England, which is a matter of public record in that country, and also in this country, by patent and by publication, for a wooden pavement made of octagonal blocks set together, and as the blocks go together, they leave a square opening through which he drove a pile or wedge down into the earth or gravel, for the purpose, as he says, of laying his pavement firmly upon the earth in newly made embankments. The reason which the patentee gives for the operation or use of his device is not conclusive. A man may, in other words, invent an improvement producing results beyond what he knows or dreams of, and a better reason may be given by a skilled person than the one assigned for the use of the device which is used or adopted. So, in this case, the driving down of these wedges into the earth under the blocks could be done just the same under the Stead device as it could be under the Stow device; al-

though Stead does not allude to the driving of the wedge down there for the purpose of compacting the earth, yet it produces that result. His failure to state that as one of the reasons or results does not necessarily change the fact that there is no longer anything novel in the Stow device, from the fact that Stead anticipated him by a great many years.

The second patent is for a pavement composed of tiers or rows of wedge-shaped wooden blocks driven into a foundation of sand or earth, as there shown. It is claimed that by this means the earth would be compacted. The spaces between the rows are then filled in with gravel.

It is sufficient, in regard to this patent, to say that there is no proof that the city has ever used it; but if it had been used, it may well be doubted whether the patent can be sustained, as his wedged blocks do not, it seems to me, differ in principle from the old cobble stone pavement, made of cobble stones with their sharp or pointed ends, or smaller ends, set downwards, and the whole rammed or driven into the sand or gravel on which it was laid. We all know, of our own knowledge, that is, every person who has seen a cobble stone pavement knows, that the process of making it was to set the cobble stones with their small end downward upon the ballast or gravel, covered with sand to fill the spaces between them, and then ram the whole structure down solid. Now, here is simply this difference: A man, instead of using the sharp ends of the cobble stones, sharpens wooden blocks and sets them together, and drives them down so as to make a solid foundation. It being conceded that the cobble stone pavements are so laid, the substitution of a new material is not patentable. This patent is also obviously anticipated in the second form of the original patent of December 10, 1867. Mr. Stow states that he claims a wooden pavement composed of blocks with the lower ends wedge-formed, and all driven down into a foundation bed of sand

or earth. Now, here in 1867, the year before this patent, in his first patent, where he claims the alternate wedge-shape and square-ended blocks, he also describes and claims a series of wedge-shaped blocks, all driven down into the sand or gravel; so it seems to me that he has here, by the second patent, attempted to prolong the life of his first patent or first device, by taking a patent afterwards upon the wedge-shaped blocks, shown and claimed with the wedge-shape and alternate square-ended blocks.

The De Golyer patent (the third) is one for a method of spacing distances between the blocks by the use of a removable strip or board of the thickness of the required spaces; that is to say, the way in which the blocks were set up against each other, and a board set between them while they were being set, and after they were set the board was removed so as to leave a space of the required distance between the rows or tiers of blocks.

This is fairly anticipated, in my estimation, by the patent of McDougal, where he had a spacing apparatus like this that was set between the blocks and was removable. But in point of fact, as the evidence shows in this case, the skillful workmen who lay these wooden pavements, no longer depend upon the spacing apparatus at all, but use their fingers and their eyes; and they become so skilled that they can readily make the spaces of a uniform width by the application of their fingers as they lay their blocks as well as by a spacing board, or any other device of that kind. And the case is fairly illustrated by the improvement in telegraphing. Formerly (we all know) the process of telegraphing by the Morse telegraph was by a reel upon which a paper was wound, and the action of the machine made a dot, or dots and lines. It was necessary to write out the words by this operation. But in course of time the operators became so skillful that the ear took the place of the paper and reels, and now no person

is considered skillful enough to act as a telegraph operator unless the ear is sufficiently trained to enable him to dispense with the reel and paper. So here in the actual operation of the laying of these wooden pavements, the eyes and the fingers of the workmen dispense with the spacing apparatus. There is also no evidence in the record that I can find, and I have looked carefully through it, of any use by the city of this special device. I find no proof that the city has ever adopted this removable spacing board as a matter of practice. But even if they had, such a mere mechanical device, such as is used by joiners in fitting floors together, or in fitting lattice work, or pickets on a picket fence, or any other place where uniform spacing is required, would seem to anticipate this device. In setting an ordinary picket fence, the joiner who sets the picket uses another picket or spacing board for the purpose of securing uniformity in the spacings.

This brings us to the consideration of the last patent issued to the complainant in December, 1872, and it is mainly upon this patent that the controversy in this case turns. The device covered by this patent is described by the patentee in the re-issue of his first (1867) patent as follows: "The nature of my invention consists in putting down a pavement of wood, or other suitable material, upon a foundation bed of sand or loose earth, and packing the sand or earth by means of wedge-blocks driven down into the same and forming a part or the whole of the pavement." He also says, in reference to these wedge-blocks: "It will not be absolutely necessary to bevel the lower ends of the blocks No. 2, as even square-ended blocks will act as wedges." Also, that the blocks No. 2 may be of dressed stone, brick or wood, or of any suitable material that will bear driving down into the foundation bed.

His last specification is as follows: "In constructing my

pavement I first grade the street, and cover it to a depth of not less than three inches with sand or loam, which I wet and pack with a maul or rammer until the whole is of sufficient compactness. I then strike the surface to a proper grade, and lay the blocks A. in rows transversely across the street, placing between the rows a removable strip of wood, B., of sufficient thickness to form the necessary space between the blocks, as shown. After a sufficient number of rows have been laid in this manner, I remove the strips and partially fill the spaces with sand or gravel. I then drive the gravel or sand in said spaces into the sand foundation below by means of a swage maul or other suitable instrument, until the foundation under the blocks is sufficiently compressed. I then fill the spaces with gravel or sand, and cover with coal tar or other cement, or with gravel or sand alone, and go over the whole with a smooth iron instrument to finish the surface. What I claim is a pavement composed of blocks laid in rows directly upon a sand foundation, with spaces between the rows filled with sand or gravel, which is swaged or driven into the said foundation substantially as and for the purpose specified."

We have a sample, or model rather, of the pavement as the complainant claims to make it; that is, square-ended blocks set upon sand, the spaces between them filled with gravel, and that packed or swaged down until it comes somewhat below the ends of the blocks. It will be noticed that while the patentee in his patent title names wooden blocks as the main material used in his pavement, yet he has described and claimed broadly a pavement composed of blocks laid in rows directly upon a sand foundation, with spaces between the rows filled with sand or gravel swaged or driven down into the sand. He names wooden blocks in his title; yet he does not, in his specification or claim, limit himself to the use of wooden blocks, but can use any kind of blocks. And

it may well be suggested, I think, in view of the state of the art, whether this claim is not too broad, because the use of other material as well as wood is so old in the art that it is at least questionable in my mind whether there is any novelty in making a pavement of blocks of any material set in sand or gravel foundation, with the spaces filled with gravel or sand. That, however, is a point not made in the trial, and I do not attach much importance to it. The question is, was this device new at the time this patent was applied for? It seems to contain the following, as some of its elements: The street or roadway is to be brought to a suitable grade and shape, and covered to a depth of not less than three inches with sand or loam; *Second*, The whole is then rammed until it is of sufficient compactness; *Third*, Upon the grade so formed the blocks are laid in rows transversely, or across the street, leaving sufficient spaces between the rows; *Fourth*, These spaces are partially filled with sand or gravel, which is swaged or rammed until the foundation is sufficiently compact; *Fifth*, The spaces are then wholly filled up with sand or gravel, or with sand and gravel and coal tar, so as to make the surface even with the top of the blocks.

There is nothing in the patent which makes it necessary for the constructer to use wooden blocks. He might, for aught that appears, use stone, concrete, or any other kind of blocks. And it is a matter of general knowledge that pavements have, for many years before this patent was asked for, been laid with stone blocks, set upon a road-bed prepared with sand or gravel, and I must insist that I can see nothing patentable in the idea of substituting wooden blocks for stone, which had heretofore been used. But even if he confined himself to the use of wood, the proof shows that Stead, in 1839, proposed to make a pavement of wooden blocks set on sand or earth foundation. In 1854, Nicolson took out his patent for a wood pavement, which he constructed by

bringing the road-bed to the proper grade, upon which he laid a covering of boards; on these boards he set rows of wooden blocks; against each row he set a shorter row of thinner blocks, or a strip of board about half the height of the first row, and so he continued to set alternate rows of long and short blocks, or rows of blocks with an intervening strip of board between; and in the spaces between the rows of longer blocks, he applied gravel and coal tar, or other cementing matter, which was rammed or swaged so as to make the whole firm and solid. The pavement in question, is the Nicolson device, or combination, with the board floor left out, and the spaces between the rows of main blocks filled with gravel, instead of partly filling the spaces with a strip of board or short blocks.

This patent was before his Honor, Justice FIELD, of the Supreme Court, in 1868. The Nicolson patent is referred to in that case. He there referred to the state of the art at the time of the granting of the Nicolson patent in these words: "This pavement," that is the Nicolson pavement, "is not the entire invention of Nicolson. Wooden pavements were invented and in use in different parts of the world, many years before his attention was directed to the subject. He makes no claim of novelty in the use of blocks, or of the gravel and tar between or over them, nor of any of the separate parts that go to make up the structure. What he claims as his invention is the combination of the foundation of the pavement with the blocks or the long blocks, and strips of board, these being bounded so as to form cells or channels, with wooden bottoms, for the reception of brick, stone or gravel and tar, as already described."

Now, here is the judicial finding of his Honor, Justice FIELD, on the state of the art at the time. Nicolson entered the field as an inventor in 1854, so that wooden blocks with the spaces or channels between them, filled with gravel and

tar was then old, and had been used and adopted long before Nicolson's patent in 1854, and he only sustained Nicolson's patent upon the ground that it was a combination of the road-bed, ballasted and packed, with boards on top, the blocks set on the boards, and then the pavement filled in with coal-tar and gravel, as described in the Nicolson patent. That is, he sustained it as a combination, and such a combination as no person before Nicolson had ever made, and a combination of useful elements.

In view of the state of the art, the question arises in reference to this patent that is now before us, can any person, after Nicolson has gone over the field and made and described his invention, dismember Nicolson's combination, and get patents for a part of the Nicolson combination? That is to say, can a party make an invention by omitting from a combination an element which performed a distinct office therein, and leaving the remaining ones to perform the same offices or functions without the omitted element that they did with it? Nicolson's improvements were found to consist of an improved foundation consisting of a board covering, laid on the old sand or earth foundation, and, in their best form, of a superstructure of alternate rows of vertical blocks and compacted filling, laid transversely or across the roadway. Is it invention to take the boards from under Nicolson's superstructure and remit it back to the common foundation? Is it not rather a mere matter of judgment with the constructer, whether he will use the improved or the common foundation? It seems to me that it cannot be that he has made an invention when he decides to leave out the improved foundation. Suppose a man to have invented a harness with a breeching, can it be invention for another man to take the breeching off and leave the remaining parts to perform the identical functions that they performed before? A reconstruction of a machine so that a less number of parts will

perform *all* of the functions of the greater may be invention of a high order, but the omission of a part, with a corresponding omission in function, so that the retained parts do just what they did before in the combination, cannot be other than a mere matter of judgment, depending upon whether it is desirable to have the machine do all, or less than it did before.

Does this inventor do anything more than others have done before, or than any lazy operative that Nicolson might set to construct his pavement might do—that is, leave the boards out, and set the blocks directly on the ground, and run the spaces full of gravel? It seems to me that it does not rise to the dignity of an invention. Leaving out a member of this Nicolson combination cannot be the proper subject matter of a patent.

Stead, in 1839, laid his wooden blocks upon a road-bed of gravel or earth, and provided that in certain cases the spaces between the blocks should be filled or partly filled up. In 1864 Chappell procured a patent in which the condition of the art is thus described by him: "Wooden pavements have been constructed on the continent of Europe and in the United States, by laying wood blocks endwise of the grain, in parallel rows, with openings or channels between, into which gravel or gas tar were placed." Now this is a description found upon the public records of the Patent Office years before this patent was used or applied for, in which the state of the art was described at that time, (in 1864,) by saying that pavements were well known on the continent of Europe, and in the United States, made of wooden blocks set endwise on the earth, and in parallel rows, with openings or channels between them, into which gravel and coal tar were placed. Again, the only thing that can be claimed as different in the Stow combination from what is described here by Chappell, is that he claims to ram his filling harder

down into the sub grade, so as to compact the earth underneath. Now, is it a subject matter for a patent to strike a blow of ten pounds, instead of a blow of four pounds weight —a blow which shall drive this filling down into the ballast underneath, instead of leaving it at the top? Is it the subject matter of a patent to drive a nail home into the wood, so that it is below the surface, or to leave it sticking up even? Much stress is laid by the complainant, in the testimony, upon the preparation of the road-bed by ramming or packing until the whole is of a sufficient compactness, before the blocks are set thereon. But Cowing, whose invention dates back to November, 1865, makes express provision for preparing the road-bed, by grading to the proper form and ramming the same solid, so that the idea of ramming the road-bed solid, making it compact before setting the blocks upon it, is an old idea, described by Cowing in 1865.

The setting the blocks and then filling and ramming the crevices with earth or gravel, was a provision also made by Cowing. The only difference is that the Cowing blocks were not set in line so that channels extended across the street in continuous lines. Cowing does not expressly direct us to ram or swage the gravel down into the sand or gravel ballast underneath; but he provides for ramming the filling, which, would, of necessity, drive it down to some degree into the ballast, and the degree of ramming can hardly be made the subject matter of a patent. We must assume that Cowing intended to have his filling sufficiently rammed to make a firm and solid pavement, and that is all Mr. Stow proposes. How much swaging or ramming would be needed to make the filling penetrate the foundation must depend entirely upon the degree of compactness to which the road-bed was brought before the blocks were set. That is, to say, if he pounds or rams, or in any other way or method compacts the road-bed underneath, or if the road-bed upon which the

blocks are set is solid enough so that it needs no compacting, then he need not, in order to make a solid pavement, ram his filling below the blocks at all. At all events, the only difference between Stow and Cowing, in the matter of swaging or ramming, is one of degree. So, also, the patent of Van Cowp & Hodgman provides for ramming the filling between the blocks until the same is thoroughly compacted. Now, where is the difference, except in degree, when in the Van Cowp & Hodgman patent they provide for ramming the filling between the blocks until the whole is thoroughly compacted? Mr. Stow certainly would not do any more than that. All he wants to do is to ram the filling until he makes a solid roadway, and Van Cowp & Hodgman propose to do that. I might go through in detail with all the various patents, ante-dating the complainant's patent, which are in evidence by the defendant, but for want of time I must content myself with the remark that several patents besides these I have specially described, seem to have anticipated the complainant both in the idea of setting the blocks directly upon an earth or sand foundation, and also of filling the spaces between the blocks with gravel or sand, packing or ramming them firmly in such spaces. Aside from these patents we have the Nicolson patent of 1854, which was only sustained because it was a new combination of useful elements; but after Nicolson instructed the public how to make a pavement of his construction, it does not seem that another man could have a patent for using a part of the same as he used it. It seems to be obvious that the degree of packing to which the filling between the Stow blocks is to be subjected depends largely upon the foundation upon which the blocks are set. The sand or loam dressing, which he provides for, is to be first compacted as hard as possible before the blocks are set, and if sufficiently compact to sustain the blocks, then no ramming down below the ends of the blocks is necessary or

possible, and the invention would therefore practically be inoperative.

Among the defendant's exhibits, is the Prescott patent of the issue, June 20, 1871, which is almost identical with complainant's patent, issued in December, 1872, eighteen months afterwards. It is almost identical in description with the Stow specification. Prescott says his pavement is composed of a series of blocks having their intermediate spaces filled with concrete, the concrete being caused to extend down below the lower line of the blocks into the road-bed, for the purpose of forming the gravel spacing as described. He specifies that the concrete is placed or driven down into the interstices between the blocks, and extends three or four inches below the surface of the road-bed or street-bed, so as to effectually prevent water from going under the blocks, and also prevent water from accumulating and running under the pavement. Then he describes the mode of laying it, as precisely the Stow method, by setting blocks endwise. But I find in the proofs a more insuperable answer to this patent than any which I have named, and it is a fact which I consider abundantly substantiated by the evidence that this precise form of wooden pavement was used in this city as early as 1864. Mr. J. K. Thompson, and other witnesses, whose testimony is in the record, have all testified that in 1864 the City of Chicago laid a pavement at the end of the viaduct on North State street, where it forms a junction with Kinzie street, in which the precise combination of the blocks with the spaces between filled in with gravel, and the whole rammed, was used. This was in 1864, and the patent in question was not issued until 1872. In 1871 or 1870, the witness seems to be a little in doubt which, when the LaSalle street tunnel was built, a portion of the road-bed in the tunnel was laid with the same kind of pavement that was used at the junction of Kinzie and State streets, by a combination of blocks

and gravel filling, without the boards, as now claimed by Stow. Now, here is the proof of the state of the art by other inventors; here is the proof of the use of precisely this Stow invention in the City of Chicago, as early as 1864, nearly eight years prior to this patent, and it seems to me there is no ground of novelty for this patent to stand on. The patentee must be considered as anticipated in every feature of his patent by those who had in fact, taken out patents, or those who had used a pavement similar in character before he entered the field.

In this view the bill will be dismissed for want of equity.

THE L. J. FARWELL.

DISTRICT COURT—EASTERN DISTRICT OF WISCONSIN—SEPTEMBER, 1877.

IN ADMIRALTY.

1. BILL OF LADING—ESTOPPEL.—If a master of a vessel signs bills of lading before the goods are on board, and afterwards they are placed on board as and for the goods embraced in the bills of lading, the bills operate on the goods as against the shipper and master, by way of relation and estoppel.

2. BILLS OF LADING ISSUED BEFORE GOODS DELIVERED—EFFECT OF SUBSEQUENT DELIVERY—POWER OF MASTER.—The master of a vessel delivered to D. a bill of lading for 8,000 bushels No. 1 wheat. Five days later he delivered to D. a second bill of lading for 8,300 bushels No. 1 wheat, but consigned to a different party. No wheat was at the time on board. D. attached the bills of lading to drafts drawn on the respective consignees which were duly paid. Subsequently 9,300 bushels of wheat were placed on board, when D. failed and could deliver no more.

The L. J. Farwell.

There was no designation by the shipper of any portion of the wheat as intended to fill either bill, it being his intention to fill both. On demand by the holders of the bill prior in time, the master delivered the amount called for in that bill: *Held*, that both bills became concurrently operative as the wheat was placed on board, and that in the absence of any appropriation by the shipper of any portion of the wheat to either bill, the holders of the bills became tenants in common and entitled to *pro rata* shares of the wheat actually delivered: *Held, further*, that the master could not on receiving the wheat on board, appropriate it to either bill, so as to bind the parties, and he having delivered the full 8,000 bushels to the holders of the bill prior in date, the vessel became liable to the holders of the second bill for the value of the *pro rata* quantity of wheat called for by their bill.

This was a libel filed against the schooner L. J. Farwell, to enforce a certain demand in favor of E. J. Burkam & Co., the libellants, arising upon the following state of facts:

In August, 1874, George B. Dickinson was a forwarding and commission merchant at Detroit. Dennis Driscoll was master of the schooner Farwell, which on the 26th of August was lying at that port. On that day the master signed and delivered to Dickinson a bill of lading for 8,000 bushels of No. 1 wheat, consigned to Reed & Co., of New York. On the 31st day of the same month, the master signed and delivered to Dickinson another bill of lading for 8,300 bushels of No. 1 wheat, consigned to libellants. Drafts were drawn by Dickinson against both bills upon the parties to whom the wheat mentioned in the respective bills, was consigned, which drafts were duly paid on presentation.

At the time the bills of lading were delivered to Dickinson there was no wheat on board the vessel, of which fact the consignees, Reed & Co. and Burkam & Co., had no knowledge when they paid the drafts drawn upon them by Dickinson. No wheat was delivered on board the vessel until the 2d of September, when Dickinson began loading the vessel, intending to put wheat enough on board to fill both bills of lading. About 9,300 bushels were placed on

board when Dickinson failed, and was unable to deliver any more wheat to the vessel. The captain testified that the vessel was chartered by Dickinson to carry 16,300 bushels of wheat to Buffalo, and that he put a bulkhead in the hold of the vessel before any wheat was delivered, intending to place the 8,000 bushels consigned to Reed & Co. aft the bulkhead, and the 8,300 bushels consigned to Burkam & Co. forward, thus keeping the two consignments separate. But he further stated that he did not wish to be understood as meaning that Dickinson told him that the first 8,000 bushels placed on board were for Reed & Co.; and the testimony disclosed that after putting 5,000 or 6,000 bushels aft the bulkhead, the remainder of the 9,300 bushels delivered, was placed forward, and if there was any purpose originally to keep the two consignments separate, it was abandoned. The bills of lading called for wheat of the same grade, and there was, in fact, to the extent that wheat was delivered, no separation of the same, for the purpose of distinct application on the respective bills.

When the two bills of lading were signed and delivered, it was the intention and expectation of both the shipper and the master, that the entire quantity of wheat called for by the bills, would be delivered on board and shipped, and the shipper, Dickinson, gave no directions for the application of wheat on one bill or the other, or for the apportionment of wheat to either bill.

The vessel did not leave Detroit, but on or about September 11th she was unloaded, and on demand of Reed & Co., and on receiving a bond of indemnity, the master delivered to them 8,000 bushels of the wheat, which was the quantity named in their bill of lading. Elevator receipts for the remainder of the wheat—between 1,300 and 1,400 bushels—were tendered to libellants, to apply on the bill in

their favor on their giving a bond of indemnity, which tender was declined.

Finches, Lynde & Miller, for libellants.

Pond & Brown and *Markham & Markham*, for respondents.

DYER, J.—It is claimed by the libellants that the wheat should have been delivered to the respective consignees, each receiving such share of the whole as should be in proper proportion to the quantity of wheat called for by his bill of lading; that the libellants were entitled to 4,736 bushels; that the vessel is liable for non-delivery of the same, and that the libellants are entitled to a decree for the value of the wheat put on board as and for the wheat embraced in libellants' bill of lading, which, it is claimed, has been converted by the master and owners of the vessel.

The question for determination involves, therefore, the ownership of this wheat under these two bills of lading.

The act of the master in signing and delivering the bills of lading in question, when there was no wheat on board the vessel, was unauthorized and irregular. A bill of lading is a contract by which the master engages to carry and deliver goods to the consignee, or to the order of the shipper. It acknowledges the goods to be on board, and they should be on board before the bill is signed. If, therefore, a master signs bills of lading before the goods are on board, or delivered to some one authorized to receive them, and they are never shipped, as the act of the master is not within the scope of his authority, the owners of the vessel are not estopped from showing the facts in a suit brought against them for non-delivery, by a *bona fide* indorsee of the bill of lading. In such case the owners are not liable.[1]

[1] 1 Parsons on Shipping and Admiralty, 187, note; *The Schooner Freeman vs. Buckingham*, 18 Howard, 191.

If, however, the bill is signed before the goods are on board, but upon the faith and assurance that they are to be delivered, and afterward they are delivered as and for the goods embraced in the bill of lading, as against the shipper and master the bill operates on the goods by way of relation and estoppel. This being so, the bill of lading then represents the property as effectually as if the execution of the bill and the delivery of the goods on board had been concurrent; and any *bona fide* holder for valuable consideration, who, by transmission to him or negotiation, has obtained such bill of lading, gets as valid and effectual a title to the goods so placed on board as could be acquired by an actual delivery of the goods themselves.[1]

Another general principle may be here stated, namely, that priority of lien or of title does not depend upon the mere priority of signing either bill of lading. It is the shipment which gives the lien; the delivery of the property on board with notice to the party, which fixes the right and vests the property.[2]

As fundamental propositions, then, to aid us in settling the rights of these parties, it may be stated that, although there was no wheat on board this vessel when these bills of lading were issued, if subsequently wheat to the extent of 9,300 bushels was placed on board as and for a portion of the grain embraced in the bills of lading, as against both Dickinson and Driscoll, the bills of lading became operative to cover the property by way of estoppel, and in such proportions with reference to each holder of a bill of lading, as, upon a correct application of the facts and law of the case, may be established; further, that the priority in date

[1] *Rowley vs. Bigelow*, 12 Pickering, 314; *Halliday vs. Hamilton*, 11 Wallace, 560.

[2] *Stevens vs. Boston & Worcester R. R. Co.*, 8 Gray, 265.

of the bill of lading held by Reed & Co. does not alone fix their right or title to any particular proportion of the wheat.

The lien or title, if any, of both Reed & Co. and the libellants, as we have seen, springs from the shipment — the delivery of the property on board.

Now, had the bills of lading called for different kinds of wheat, and if such different kinds had been put on board, the appropriation to each bill of the kind of wheat called for, would seem clearly consistent with the rights of each holder of such bill of lading. So, too, if the master had received on board 8,000 bushels of wheat, and then given to the shipper a bill of lading therefor, and afterward had issued another bill of lading for 8,300 bushels, and had then received but 1,400 bushels, there would be no difficulty in appropriating the 8,000 bushels to the first bill of lading. In these cases it would be apparent that the bills of lading covered specific wheat, and such appropriations would accord with the evident intentions of the parties as manifested by their acts.

But in the present case there was no wheat on board the vessel when either bill of lading was issued. After both were issued, the shipper commenced delivering the wheat to the vessel, intending to fill both bills. Undoubtedly Dickinson could have controlled and directed the application of the wheat on either bill, and his direction in that respect might have been conclusive. But he made no such direction, and so far as his intentions were concerned, he delivered the wheat as much for one bill as the other, since it was his expectation to place on board the full amount of both consignments. He had it in his power to deliver first the wheat to fill the second bill, and could have refused to deliver any upon the first bill, and in that case the holder of the bill posterior in date would have taken his full *quantum* of grain. But there was no designation or appropriation by the shipper.

This being so, could the master, after receiving the wheat

on board, appropriate it to such bill of lading as he chose, and bind the parties? After much deliberation upon this point, I am convinced he could not, and will presently state reasons for that opinion. Then, if there was no specific appropriation of the wheat on either bill by the shipper, and if there could be none by the master, how, according to legal principles, must it be appropriated?

As no wheat was placed on board until after both bills of lading were issued, and as there was no designation by the shipper, of specific wheat for either bill, but an intention on his part to deliver the entire cargo according to the charter, both bills, although bearing different dates, became concurrently operative; that is, both became effectual to cover their proportionate shares of the wheat delivered, as the wheat was placed on board. Without regard to the dates of the bills of lading, from the time the wheat delivered on both bills was in the custody of the vessel, the legal relations of Reed & Co. and of the libellants were fixed. As soon as the wheat was deposited with the carrier, the title to it and right of property in it, was vested in those parties. Their bills of lading called for wheat of the same grade; the property was mixed and could not be distinguished, and there was not sufficient to satisfy the demands of both.

They stood, then, in the position of tenants in common, and determining their rights accordingly, each was entitled to wheat from the common mass in proportion to the amount called for by his bill of lading, and it was the duty of the master so to deliver it. In my judgment this conclusion is not to be avoided, if it be conceded that the wheat was put on board as and for the wheat covered by both bills of lading. And I think the proofs show that the shipper placed the wheat on board as a part of the 16,300 bushels embraced in both bills, and as both bills became concurrently opera-

tive to pass the title to the wheat, the holders of the bills of lading took title in common.

But it has been ably contended by the learned counsel for respondents that the master was justified in delivering the 8,000 bushels of wheat to Reed & Co. because their bill of lading was prior in date, and should first be made good from the wheat first delivered; further, that up to the time any wheat actually went on board, the transaction between the shipper and the master was purely personal; that the master was personally liable to the parties to whom the bills of lading were transmitted, and who paid drafts on the faith of them; that, therefore, in the absence of any appropriation of the wheat by the shipper, the master had the legal right to cancel his liability to either party on the bill of lading held by such party, by delivery of wheat sufficient to fill that bill, and stand personally responsible to the party holding the other bill; finally, that upon the bills of lading being issued, Dickinson stood in the relation of debtor to Driscoll, and that when wheat was delivered without specific appropriation by the former on either bill, the master, as his creditor, had the right to apply it according to the doctrine of appropriation of payments.

Upon the first point taken I have already sufficiently stated my judgment. As no wheat was delivered until after the issuance of both bills, and as it was the intention of the shipper to satisfy one bill as much as the other by delivery of wheat for both, and as the bills became operative only when wheat was deposited on the vessel, I am unable to see how priority in date of their bill gave Reed & Co. priority of right.

Had the master a right to so appropriate the wheat as to fully satisfy one bill of lading to the exclusion of the other? It is true, as already stated, that his action in signing the bills of lading before any wheat was delivered was irregular,

and it may be admitted that he thereby incurred a personal liability to the holders of the bills. But when wheat was delivered by the shipper and was deposited on the vessel to meet the bills, certain relations sprang up between the consignees and the property. Certain rights in favor of the holders of the bills, and certain obligations on the part of the carrier, then became established, which could not be divested by any personal act of the master. The moment he began to receive grain on board to cover the bills of lading he began to act, not for himself alone, but as the agent of the vessel. The error of the position here urged arises from ignoring the legal relations to the property of Reed & Co. and Burkam & Co., which were created and fixed by the delivery on board the vessel for shipment, of wheat called for by the bills of lading. The argument on this point proceeds upon the theory that the master became personally liable to the holders of the bills of lading; that Dickinson became his debtor, and that in partial satisfaction of the debt, Dickinson delivered to him this wheat, which the master personally had the right to appropriate in payment of any part of his indebtedness created by the bills of lading. But the argument fails when we consider that the wheat was delivered on board the vessel; that in receiving it the master acted as the vessel's agent, and that, by established principles of law, when the wheat passed into the custody of the vessel, a right of property vested in the consignee, which could be no more affected by the personal act of the master than by that of any other person. And this is entirely consistent with the proposition that, as to all wheat called for by the bills of lading and not delivered on board the vessel, Dickinson and Driscoll, and not the vessel or its owners, are alone liable. It by no means follows that because originally, and before any wheat was placed on the vessel, the master may have incurred a personal liability by signing the bills of lading, he had

the right to appropriate on either bill, as he saw fit, the wheat actually delivered on board.

It is further insisted that the master had the same right to appropriate the wheat to the bill of lading earliest in date, as a creditor has to apply moneys paid to him by his debtor upon promissory notes when the payment is general by the debtor, and the demands are various in date. In other words, the doctrine of appropriation of payments is invoked, which is, that where a debtor owes his creditor on distinct accounts, he may direct his payment to be applied to either demand. If he makes no appropriation, the creditor may apply the money as he pleases. If no specific application is made by either party, the law will appropriate it as the justice and equity of the case may require.

I do not think this rule can be successfully invoked so as to give to the master the right to appropriate the wheat upon either bill of lading as he should choose. In the case of application of payments under the rule stated, no other party than the debtor and creditor are interested. The money paid by the debtor becomes the money of the creditor in his personal right, and the interests or rights of third parties are not involved. The views already expressed touching the rights of the holders of these bills of lading, and their relations to the property, afford a further answer to the particular point under consideration, and need not be repeated. In analogy to the present case, counsel suggested that if a vessel were chartered to carry wheat to one party, lumber to another, and shingles to still another, and bills of lading were accordingly issued before any part of the cargo was placed on board, and subsequently only wheat and a portion of the lumber were delivered, the party whose bill was not filled would not be heard to demand a *pro rata* share of the value of that part of the cargo delivered. The analogy fails, because in the case supposed the bills of lading would

be issued for and on account of specific and dissimilar kinds of property. The consignee of lumber would have no right to call for wheat, and the holder of a bill of lading for shingles could not demand any other property than such as his bill specified. The bills of lading held by Reed & Co. and Burkam & Co. called for No. 1 wheat. With no specific designation of any particular portion to apply on either bill by the shipper, either expressed or to be inferred from the character of the property, the delivery of any part of the cargo would satisfy the terms of either bill of lading, and give to the consignees what they were entitled to.

It is said that the libellants cannot have a decree because they have failed to show ownership of any part of the wheat placed on board the vessel, and that the burden of proof is upon them to establish such ownership. The answer to this proposition involves a repetition of what has been already stated as to the effect to be given to the bills of lading, and the time when they became operative to vest the property in the holders of the bills. When the wheat was placed on board, these bills of lading represented that property, and the title to the wheat was changed and vested in the parties to whom it was to be delivered.[1] To the extent that libellants' bill of lading represented the wheat on board, they became vested with title and ownership.

Let a decree be entered in favor of libellants for the value of their proportionate share of the wheat delivered to the vessel as prayed in the libel.

On appeal, this judgment of the District Court was affirmed by Mr. Justice HARLAN.

A bill of lading is as between the original parties in the nature of a receipt, and is open to explanation. The respondents are not estopped from setting up a mistake, and that the property receipted for was not

[1] *Halliday vs. Hamilton*, 11 Wallace, 564.

all delivered to them; and where they have shown that the whole of a cargo of wheat received by them was actually delivered to the consignee, they are not liable for a deficiency from the amount receipted for in the bill of lading. *The J. W. Brown*, Vol. I. of this series, page 76.

The master of a vessel has no authority from the owners to sign bills of lading in blank, and a bill of lading so signed is not valid against the owners, even in the hands of *bona fide* holders. *The Joseph Grant*, *Ibid.* 193.

Where two bills of lading describing the cargo shipped were made out in full, one of which was signed by the master, and the other by the shipper, and a third one was signed in blank by the master and left with the shipper, who, after departure of the vessel, filled up the blank bill with a change of consignee, and transferred it to a bank as collateral security for advances for the owners of the cargo, no maritime contract was thereby created between the bank and the vessel, without notice to the master, before delivery of the cargo according to the first bill of lading sent with the vessel. *Ibid.*

Although as a receipt a bill of lading is subject to explanation, and can be affected by parol proof, yet, in so far as it is a contract, this rule does not apply. *The Wellington*, *Ibid.* 279. [*Reporter.*

JANET SMITH, Adm'x, Etc. vs. NORMAN C. PERKINS *et al.*

Circuit Court—Northern District of Illinois—October, 1877.

In Equity.

Mortgages—Trustees—Negotiable Paper—Equities between Prior Pledgee and Subsequent Lienors—Constructive Notice of Record—Due Diligence.—Where A., a trustee under a deed of trust upon real estate to secure a promissory note, was entrusted with the note for collection, the holder indorsing it in blank, and fraudulently pledged the note before maturity, indorsing it in blank, for a debt of his own to B., who acted in good faith; and subsequently, through *mesne* conveyances of record which recited the deed of trust, A. took title to the property, assuming the debt secured by the deed of trust, and afterwards obtained loans on the faith of his title, representing the trust note to have been paid, and then exhibiting and recording a release from himself as trustee, purporting to operate before he took title: *Held*, As between B. and the other lienors the former had a better equity, and that the acts and conduct of A., after he became the owner of the land, were not entitled to be considered as those of a trustee.

This was a bill filed by the complainant to enforce an alleged lien upon lots 15 and 16 in block 111, of the school section addition to Chicago, arising under a mortgage or deed of trust, executed by George N. Williams, to Obadiah Jackson, on the 1st of October, 1868, to secure a note of $30,000, given by Williams to Charles C. Waite. The facts in the case, so far as they are material to a decision of this controversy, were substantially as follows:

Charles C. Waite, then a resident of the city of New York, was the owner of the property on the 1st of October, 1868, and Obadiah Jackson, one of the defendants, was then

an attorney-at-law and resident of the city of Chicago, and the agent of Waite to dispose of it. Accordingly, Jackson, having informed Waite that he had obtained a purchaser, transmitted to Waite, for his signature, a deed to George N. Williams, the alleged purchaser, and Waite duly executed on the 1st of October, 1868, a deed conveying the property to Williams. $10,000 were paid in cash, and two notes were given purporting to have been signed by Williams, one for $6,000, payable in one year, and the other for $30,000, payable in four years, which last note is the one in controversy, the $6,000 note having been paid; and to secure these two notes, Williams on the same day executed a deed of trust to Jackson. These notes were transmitted to Waite, and the note in controversy was by him assigned to his brother, S. M. Waite, then a resident of Vermont. The latter transmitted the note to Jackson, for collection, (the interest being payable semi-annually,) having indorsed it in blank, thus clothing Jackson with authority over the notes, as apparent owner and holder thereof.

On the 5th day of October, 1868, Williams, by a warranty deed, conveyed the land to Mary P. Moody, and on the 17th of May, 1871, Mrs. Moody conveyed the land to Dr. C. V. Dyer, by a deed of warranty. On the 1st of June, 1872, Dr. Dyer conveyed the land to Jackson, the trustee in the deed of 1st of October, 1868. All these conveyances, it is admitted, were made subject to the deed of trust already referred to, and stated that the respective grantees assumed and agreed to pay the debt to secure which the deed of trust was given. And in the deed to Jackson, it is recited that the conveyance was made subject to the trust deed, on which was due $30,000 and interest, the payment of which was assumed by Jackson. On the 18th of April, 1871, Jackson being indebted by note for $31,500 to the complainant's intestate, as collateral security for the same, transferred to him

the $30,000 note secured by the deed of trust, having written over the blank indorsement of S. M. Waite, "Pay to Obadiah Jackson or order;" and thereupon Jackson indorsed the note in blank, by writing his own name thereon, he acting throughout as the absolute owner of the note.

Long after this arrangement was made by Jackson with Smith, Jackson pretended still to hold the $30,000 note, as agent and attorney of Waite, and occasionally made remittances to him to keep up the deception, he having no knowledge or even suspicion that the note had been pledged to Smith. He also continued to pay, till October, 1876, the interest on his note to him. Subsequently, Jackson, claiming to be the owner of the property, and being then considered responsible, though since insolvent, desired to raise money on it, and obtained a loan from the Messrs. Swift, of Philadelphia, alleging that the $30,000 note had been paid, and had been destroyed by the fire of 1871, although it had not yet become due and payable, and he produced to their agent and attorney, in August, 1872, when this negotiation took place, a deed of release from himself, as trustee, to Dr. C. V. Dyer, dated October 2, 1871. This deed of release was not acknowledged or recorded until August, 1872, and was undoubtedly executed about that time, although purporting to bear date on the 2d of October, 1871. All the other deeds were executed at or about the time they bear date, and were within a short time of their date duly recorded. Jackson afterwards attempted to raise an additional sum of money upon the security of this property, and gave a second mortgage or deed of trust, under which some of the defendants claim a lien.

Van H. Higgins and *W. T. Burgess*, for complainant.

W. C. Goudy and *Orrin Skinner*, for defendants.

DRUMMOND, J.—The main question in the case is whether

the $30,000 note is a valid lien upon the property under the deed of trust of the 1st of October, 1868, given by Williams to Jackson, as against Messrs. Swift and others, defendants, claiming also liens upon the property. I think it is.

Some question has been made whether Williams, the grantee in the deed given by Waite, was a real person.

There is no satisfactory evidence in the record that he was a fictitious person; the testimony of Mr. Hoffman who took the acknowledgment of the deed of trust, rather indicates that he was a real person, as he says he never took an acknowledgment unless he knew the grantor, or he was introduced to him as the grantor by some person of his acquaintance. But I apprehend it would make no difference even if Williams were a fictitious person. Waite, through whom the parties claim title, would be estopped from setting up any right to the property after what has taken place.

It is conceded that Jackson perpetrated a fraud in pretending to be the owner of the note, and in transferring it to Smith, when, in fact, he simply held it as agent and attorney; this being so, the question is, who is to suffer by the fraud of Jackson, Smith, or these other defendants who confessedly have advanced their money in good faith, relying upon the security which was given to them by Jackson? I think, under the facts, Smith must be considered a *bona fide* holder of the $30,000 note for value, and therefore entitled to all the protection which the law gives to the holders of mercantile paper purchased for value before maturity.[1] His lien was prior in point of time to that of the defendants. It was created by deed of trust which was on record and notice to all the world, and in addition to this all the parties, from Williams to Jackson, who received a conveyance of the property, took it with an express recital in each deed that it was subject to the debt secured

[1] *Goodman vs. Simonds*, 20 Howard, 343.

by the deed of trust; and further, the respective grantees agreed to become responsible for the debt, and pay it; in other words, they took the property subject to the incumbrance, and understanding that, before they could obtain a good title to it, the deed of trust was to be canceled and discharged by the payment of the debt.

Every person taking title to property is bound by the recitals of his title deeds, so, therefore, were all these grantees, and Jackson among the others. But it is said that admitting the Swifts had no right to take the statements of Jackson as to what had become of the $30,000 note, as the evidence shows that their counsel did, even before its maturity, still when the other defendants advanced money upon the property, there was on record a release, purporting to bear date on the 2d of October, 1871, from Jackson to Dyer, and therefore, that their lien at least was valid, however it might be with that of the Swifts.

As to the lien of the Swifts, objection was made at the time, that there was no release of the deed of trust, and before the money was advanced a release was required, and accordingly it was produced and was acknowledged and recorded in August, 1872, but at the time this was produced and at the time it was undoubtedly executed, Jackson had become clothed with the apparent title to the property—he had ceased to be a mere trustee, and had no claim to the immunities or privileges of a trustee; and neither was his conduct or actions entitled to the same legal presumptions in his favor as if he had been a mere trustee. Therefore, under the circumstances, parties advancing money on the faith of such title had no right to take the declarations of Jackson, or to assume that the release necessarily operated on the 2d of October, 1871, to clothe Dyer with the absolute title to the property, discharged from the operation of the deed of trust. And as to the lien of the other defendants, (and the same

rule is applicable to all of the defendants,) there was on the face of the title, upon the faith of which they advanced their money, enough to show that it was their duty to ascertain whether or not the debt, which the deed of trust had been given to secure, was paid.

Jackson took the title on the 1st day of June, 1872, subject to the $30,000 note, and agreed to pay it or to hold his title subject to it. There was, therefore, on the record and on the face of his title at that time, something which contradicted the apparent effect of the deed of release purporting to be made on the 2d of October, 1871, and therefore, the fact that the deed of release was not acknowledged and recorded till August, 1872, was of special significance, because if there had been a deed of release executed on the 2d of October, 1871, the property would have been entirely discharged from the operation of the deed of trust, and the recital in the deed of June 1, 1872, could not be true. So that there was, on the face of the title and the record, enough to rouse suspicion and to show that it was the duty of any person who advanced money upon the title to ascertain whether or not the deed of trust of the 1st of October, 1868, had been in fact discharged. If, then, it be admitted that under ordinary circumstances full effect is to be given to the acts of a trustee as to property which he holds as such, still in this case, Jackson, from the new relation which he assumed, having become clothed with the title, ceased to be a mere trustee, and the rule does not apply, and all parties were required to exercise legal diligence to see that the title was valid and the property released from the lien of the deed of trust by the payment of the debt.

The plaintiff is, therefore, entitled to a decree to enforce her lien against the property as the prior equity.

This opinion of the Circuit Court was afterwards affirmed by the Supreme Court in *Swift vs. Smith*, 12 Otto, 412.

In re FRANK STURGES *et al.*

DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS—OCTOBER, 1877.

IN BANKRUPTCY.

COMPOSITION WITH CREDITORS—VOLUNTARY PAYMENTS.—Where a creditor accepted a failing debtor's offer of compromise, but with a proviso that no other creditor should receive better terms; and the debtor afterwards voluntarily paid some of his other creditors in full: *Held*, that this did not vitiate the settlement

S. Sibley, for bankrupts.

Lyman & Jackson, for claimant.

BLODGETT, J.—This is an application for a re-examination of a claim proven by the Matthiesson & Hegeler Zinc Co. against the estate of Frank Sturges & Co. in bankruptcy.

The claimant insists that in the fall of 1871, the bankrupts were indebted to it in the sum of $4,897.70, on an open account for goods before then sold and delivered to them: that bankrupts sought a composition with their creditors on the basis of fifty cents on the dollar of their indebtedness, and the claimant agreed to accept said terms of composition on condition that no greater sum was to be paid any other creditor. They allege, however, that the bankrupts did pay a larger sum to Phelps, Dodge & Co., and other creditors, whereby claimant became entitled to the payment of the balance of the indebtedness so compromised. Sometime in November last, the firm was adjudicated bankrupt, and this claim is now proven for $3,573.84, being for one-half the

original indebtedness, and interest since December 8, 1871, the time when the composition settlement was made.

The proof shows that soon after the great fire in this city on the 9th of October, 1871, the firm of Frank Sturges & Co., who had for many years before that time been engaged in business here as wholesale dealers in metals, found themselves unable to pay their debts in full. They offered to pay all creditors, whom they owed over $100, fifty cents on the dollar in full settlement of their respective demands. The creditors all accepted the proposition, and were settled with, and have been paid upon the proposed basis. Among the creditors were the present claimants, who agreed to the terms offered, but with the written understanding "that none of the other creditors, including banks, should receive better terms."

There is no proof showing or tending to show that the bankrupts paid more than fifty per cent. at the time of obtaining this composition, to any of their creditors to whom they owed over $100, with the exception of a firm in Burlington, Iowa, whose claim amounted to $113, and, on learning this fact, the claimants expressed themselves as entirely satisfied with this last transaction—the amount being so small. There is, however, no doubt but what, while negotiating for their settlement, the firm held out to all their creditors that they should consider themselves morally bound to pay in full as soon as they were able. The settlement at fifty per cent., however, was to be a legal acquittal of their indebtedness, and the only obligation to pay the balance was the moral one which any honorable debtor feels or ought to feel.

There is no proof that any creditor was paid more than this claimant in order to effect the settlement, nor that any false statements in regard to the assets and liabilities of the firm were made in order to obtain the settlement.

It does appear from the proof that after the settlement, and after the firm resumed business, and during the latter part of 1872 and the first half of 1873, the firm paid several of their old ante-fire creditors in full, including the Northwestern National Bank, Phelps, Dodge & Co., of New York, Morehead & Co., of Pittsburgh, and others.

The payments to the bank were made, to a considerable extent, by turning out paper, while that to Phelps, Dodge & Co. was made by the way of a sale of a valuable lot and building in this city, owned by Mr. Sturges, which was heavily mortgaged. Phelps, Dodge & Co. assumed the mortgage, and applied the old balance on the amount paid for the equity.

The firm of Morehead & Co. received their payment by way of a trade, in which they took a house and lot in this city belonging to Mr. Lee, one of the firm, and a part of the balance of the old debt was applied on the purchase money. One of the other firms has since received some payments to apply on the old debt by means of extra commissions on business transacted with or for them. All these payments were made after the firm was legally released from the obligations to make them, and no doubt, were made in pursuance of the intention expressed by the firm to pay all their debts as fast as able. The financial panic of September, 1873, and the subsequent depression in business, has prevented the consummation of this laudable purpose.

The claimant, as well as many others of the firm's old creditors remains unpaid, except as to the sum accepted in composition.

This court has recognized the principle too frequently to require authority, that when a debtor seeks a settlement with his creditors at less than the amount due them, a payment to one, of more than the amount held out as the sum to be paid all, vitiates the transaction and authorizes each creditor

to collect his entire debt, or at least, so operates in favor of the creditors imposed upon. But the creditors here make out no such case. What the debtors paid after being legally released, were mere voluntary payments, which could not have been enforced, and although it might seem more in accordance with our ideas of the principles of justice and fair dealing, that when the debtors found themselves able to apply any of their means in payment of their old canceled obligations, they should have done so *pro rata*, and treated all their creditors alike by making a general dividend; yet I cannot see that their failure to do so, revives the old debts, and makes them liable for the payment of these old debts.

Men released from their debts by the statute of limitations, or as this firm was by a legal composition, may have peculiar personal reasons for acknowledging their moral obligations to one creditor, and afterwards paying him in full, which do not apply to all their creditors, and it would be a harsh rule to say that because a man recognized his moral obligation in one case, it revives a canceled legal obligation toward all his old creditors.

This would make it dangerous for men to recognize moral obligations, for while all debts may be equally binding legally, we know that all men recognize a higher degree of moral obligation to pay some than they do others.

The claim should be expunged.

ISADORE ALKAN *et al.* vs. IRVING M. BEAN, Collector, *et al.*

Circuit Court—Eastern District of Wisconsin—October, 1877.

In Equity.

1. Injunction Against Collection of Assessment.—Allegations in a bill, that an assessment made by the Commissioner of Internal Revenue, is irregular, and in violation of law, and void, do not constitute ground for an injunction to restrain the collection of the assessment.

2. Statements by a Collector of Internal Revenue, to the effect that the Government has no claim upon distillery property for unpaid taxes, do not affect the right of the Government to assert an existing lien for taxes upon such property.

3. The remedy by bill in equity to collect assessments, conferred by Sec. 3,207, Revised Statutes, is cumulative.

4. Lien of Government.—Sec. 3,224, Revised Statutes, is not limited in its application to the party taxed. A purchaser of distillery property upon which there is an existing lien for taxes due to the Government, cannot acquire the same freed from such lien, though he purchase in good faith, for value, and without notice of the lien.

5. Lien—Forfeiture.—In a case where proceedings were instituted, for forfeiture of a distillery, followed by seizure and subsequent release of the property on bond under Section 3,331, Revised Statutes, but which were afterwards discontinued by the Government without any judicial declaration of forfeiture, a lien for unpaid taxes is not lost or affected by such bonding and release of the property in the forfeiture proceeding, and a subsequent purchaser from the former owner takes the property incumbered by the lien.

This was a motion on the part of the defendants to dissolve a temporary injunction granted at the time of the filing of complainants' bill.

The bill charged, that the defendant, Bean, was collector, and that the defendant, Buckley, was deputy collector of in-

ternal revenue for the first collection district of Wisconsin; that the complainant, Alkan, was the owner of certain premises described in the bill, upon which was situated a distillery with all the distilling apparatus appertaining thereto. That these premises were conveyed to Alkan, October 12, 1875, by Lewis Rindskopf and wife; that on the 13th of October, 1875, he leased the property to the complainant Swenger, for the term of two years, at the annual rent of $2,500; that Swenger thereupon took possession of the premises and then began and thereafter carried on the business of distilling spirits thereon; that he executed the proper bond as a distiller, which was accepted by the officers of the United States; that he had paid all taxes upon all distilled spirits made by him, and complied with the laws relating to the distillation of spirits; that previous to the purchase of the property by Alkan, the business of distilling had been carried on by Rindskopf upon said premises; that on the 7th day of October, 1875, the premises, distillery and apparatus were seized by the collector for alleged infractions of the laws of the United States relating to internal revenue; that Rindskopf, as claimant, intervened, applied for the appointment of appraisers and release of the property, pursuant to Section 3,331, of the Revised Statutes; that appraisers were appointed, an appraisal made, and a bond given; that the distillery premises were released from seizure, and that the bond is still outstanding and in force; that afterwards an information was filed against said property, which recited the seizure, and prayed condemnation, but the prosecution thereof was afterwards abandoned by the United States, and was regularly dismissed.

The bill further alleged that prior to the purchase of the premises and property by Alkan, he informed the collector and deputy collector of his contemplated purchase, and desired to know whether the United States had any claim

against the property, and whether there were any unpaid taxes thereon due to the United States; that he was informed by the collector and his deputy that there were no such unpaid taxes, and that the United States had no claim against the property; that relying upon such statements and information he purchased the premises in good faith, and paid $15,000 therefor.

That about Nov. 1, 1875, the Commissioner of Internal Revenue assessed a tax upon or against said Rindskopf for $49,427.45, as being due for spirits distilled upon said premises, by Rindskopf, in the months of December, 1874, and January, February, March, April, May and June, 1875. The bill charged that this assessment was made irregularly, and in violation of law, and was void; and alleged further, that this assessment was certified by the Commissioner to the defendant collector about Nov. 6, 1875; that the collector issued a warrant under which the premises in question were advertised for sale, to satisfy such assessment, which sale was thereafter abandoned; that on the 19th of May, 1876, the United States filed a bill in equity in this court against Rindskopf, the complainants in the present bill, and others, to subject said property, with other property, to sale, to satisfy said assessment, which bill in equity was still pending; that the property sought to be subjected to sale by that bill, aside from the premises owned by complainant, Alkan, consisted of three distinct parcels, of more value than the whole amount of the alleged assessment.

The bill further alleged, that on the 10th of January, 1877, the defendant, Bean, as collector, issued a warrant to the defendant Buckley as deputy collector, for the collection of said assessment, under which warrant a seizure and levy were made upon the premises and distillery in question, and the same were advertised for sale; and the bill charged that such sale would be inequitable and unjust, and would create a

cloud upon the title, and destroy the business carried on at the distillery. The prayer of the bill was for a perpetual injunction restraining the proposed sale, and any interference by the defendants with the property and business there carried on.

On filing this bill, a temporary restraining order was granted. The bill was demurred to, and on hearing, the demurrer was overruled. It was at the same time considered by the court that the temporary injunction previously granted should stand until the filing of an answer, when the defendants would be at liberty to move to dissolve that injunction. Subsequently an answer was filed and this motion was made.

The answer admitted the conveyance of the premises by Rindskopf to the complainant, Alkan, and the leasing of the same by the latter to the complainant, Swenger, but denied that these transactions were in good faith. It alleged that the premises, with the distillery thereon, had been for a long time in the occupancy of, and owned by, Rindskopf, and had been operated by him as a distillery, and various allegations were made in the answer, impeaching the good faith of the alleged purchase and ownership of the premises by Alkan, and the occupancy and possession of the same by Swenger.

The answer admitted that the distillery premises were seized, October 7, 1875, by the collector; that the same were appraised and a bond given therefor, and that they were released from such seizure. But it was denied that the bond was outstanding, and it was alleged that the United States took no steps in said proceedings after such release, beyond the filing of an information, and that thereafter and before the issuance of the warrant for distraint and sale of the property, the proceedings were abandoned and notice of discontinuance was filed, and the same were regularly discontinued.

It was also admitted that about October 12, 1875, the complainant, Alkan, inquired of the collector if the United

States had any assessment against the distillery premises, and stated that he was talking about buying the property; that the deputy collector stated that the collector had no notice of any assessment against the premises, but that he could not tell when or how soon they might have such notice, and that they could give no guaranty against any assessment which might be made.

The answer further admitted that the Commissioner of internal revenue assessed the tax for $49,427.45, mentioned in the bill, alleged that such assessment was duly and regularly made, and what were claimed to be the facts and circumstances of the assessment were set forth, that the defendant, Bean, on the 10th of January, 1877, issued a warrant for the collection of said assessment, by virtue of which a seizure of the premises was made, and the same were advertised for sale. It was also admitted that on the 6th day of November, 1875, a warrant was issued for the collection of the assessment, and the premises were under that warrant advertised for sale, but that subsequently those proceedings were abandoned. The filing of the bill in equity, May 19, 1876, by the United States against Rindskopf and others, as alleged in the present bill was further admitted, but it was denied that the property sought to be subjected to sale by that bill, aside from the distillery premises, was of sufficient value to pay and satisfy said assessment. The answer also alleged that the present suit was brought to restrain the collection of a tax, within the meaning of Section 3,224 of the Revised Statutes.

J. P. C. Cottrill and *J. C. McKenney*, for complainants.

G. W. Hazelton, for defendants.

DYER, J.—By Section 3,251 of the Revised Statutes, the tax imposed by law on distilled spirits produced from any

distillery, is a first lien on such spirits, the distillery used for distilling the same, the stills, vessels, fixtures and tools therein, the lot or tract of land whereon the distillery is situated, and any building thereon, from the time the spirits are in existence as such until the tax is paid.

Section 3,224 provides that "no suit for the purpose of restraining the assessment or collection of any tax, shall be maintained in any court."

The distillery premises in question, as appears by the bill, were conveyed to complainant, Alkan, October 12, 1875. The assessment by the commissioner was made in November, 1875, but it was for and on account of spirits distilled in December, 1874, and in January, February, March, April, May and June, 1875. So that the tax thus assessed, if legal and valid, was a lien on the property when the spirits came into existence, and unless this lien was subsequently lost, it continued and was in force at the time Alkan took his conveyance from the former owner.

The allegations in the bill that this assessment was made irregularly and in violation of law, and is therefore void, do not furnish ground for the intervention of the court by injunction to restrain the collection of the alleged tax. Upon this point I adopt without hesitation the language of the court in *Howland vs. Soule*, Deady's Reports, 414. "The object of the statute is to prevent the assessment and collection of the public revenue from being hindered or delayed by judicial proceedings, at the instigation and upon the representation of parties interested, to avoid or resist the payment of taxes. The statute would be wholly inadequate to that object if such parties were allowed to maintain suits to enjoin the collection of a tax because, as they say, the proceedings in the revenue department were erroneous or illegal.

"The statute prohibits all suits to enjoin the collection of a tax, and leaves the person who considers himself aggrieved

by the collection thereof to the ordinary and usual remedy—an action at law to recover back the amount paid.

"This is a tax within the meaning of the statute. It has the form and color of a tax. It was assessed upon manufactured articles liable to a duty, by a person in office and clothed with authority over the subject matter. The tax has come to the defendant for collection in due course of office, and from the proper authority. The defendant is the person authorized to collect such taxes, and by the means proposed—the seizure and sale of the complainant's property."

The lien in favor of the United States could not be waived or affected by any statements made by the collector or his deputy to the complainant, Alkan, to the effect that the Government had no claim against the property, and that there were no unpaid taxes thereon. No such statements or representations could estop the Government from asserting any claim, or lien existing in its favor for unpaid taxes. And the complainant could not acquire the property divested of any such claim or lien because he may have relied upon such statements as are alleged in the bill to have been made by the collector prior to his purchase. If such representations or statements were made, they could not bind the Government nor affect its rights.

Nor does the fact that at the time the proceedings against the property now sought to be restrained were instituted, there was pending a bill in equity previously filed by the United States under Section 3,207, to subject this distillery and other property to sale to satisfy the assessment, preclude the Government from enforcing its alleged lien or claim by the statutory methods now pursued. The remedies given by the statute are concurrent. No one of them is exclusive. Section 3,207, which authorizes the filing of a bill in chancery, does not declare that remedy exclusive, while Section 3,253 evidently contemplates concurrent remedies.

But it is contended upon other grounds that Section 3,224 ought not to be enforced against complainants' alleged equities. It is said that the complainant, Alkan, was a purchaser in good faith without notice of any claim by the Government for unpaid taxes upon the distillery premises, and that the statute was not intended to forbid a suit by such a party to restrain the collection of a tax. This position is untenable unless the court can by construction properly add to this section what does not appear by its express terms. The language of the section is plain and comprehensive. "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." No exception is here stated. The scope of this section is not limited in terms to the party taxed. The evident purpose of the section is, as was held in *Delaware R. R. Co. vs. Prettyman*, 17 Internal Revenue Record, 99, "to prevent any interference with the prompt and regular collection of the revenue;" and where the commissioner of internal revenue, in making an assessment, acts within the limits of his jurisdiction, so that his acts cannot be treated as nullities, I am of the opinion, as was held in the case just cited, that the purpose of the law was to prevent any person disputing by injunction process the validity of a tax assessed under the authority of an act of Congress. The lien of the Government attaches under Section 3,251, as we have seen, from the time the spirits come into existence. This being so, how can a person subsequently purchase the property upon which the lien is by law imposed, and which is then existing, freed from the lien and its consequences, though his purchase may be innocent and without actual notice? In the case of *United States vs. Turners and Stoltz*, 18 Internal Revenue Record, 5, Mr. Justice SWAYNE held that the provisions of the statute then in force, that the tax shall be a lien on the interest of the distiller in the tract of land whereon the distillery is

situated, from the time the spirits are distilled until the tax shall be paid, is absolute and unconditional, and secures to the Government a lien upon the distillery premises as against innocent purchasers without notice.

In that case the tax accrued while the Turners were owning and operating the distillery. Subsequently they sold the distillery, and ultimately Stoltz became the innocent owner for value, and as such claimed to be protected. But the court granted a decree in favor of the Government for sale of the property upon bill filed to subject the distillery to payment of the tax.

In connection with Section 3,224, the provisions of Section 3,226 may be noticed as bearing upon the evident object of the legislation on this subject. That section provides that no suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected until appeal shall have been made to the commissioner of internal revenue, and his decision shall have been had thereon. The purpose of the legislation on this subject plainly is to prevent any interference by suit against the officers of the Government with the collection of the tax. As Judge SHIPMAN says, in *United States vs. Black*, 11 Blatchford, 543, "by the provision that no suit can be maintained for the purpose of restraining either the assessment or the collection of the tax, the statute has in fact provided that payment must be made at all events whether the tax was justly or unjustly levied, and that redress for an unjust exaction must be sought subsequently. The distiller is thus obliged to pay his taxes as they are assessed, and when they mature. If he neglects to pay, payment can be enforced by distraint, in which event his remedy is to pay the tax and appeal to the commissioner. If the appeal is denied, he can then resort to the courts to obtain repayment."

In conclusion, upon this question my view is, that where

the assessing officer has jurisdiction to make the assessment, and a tax is assessed, inasmuch as the lien exists from the time the taxable articles come into existence, there cannot be incorporated into Section 3,224 an exception in favor of a subsequent purchaser of the property to which the lien is affixed, though such purchaser may have acquired the same innocently and without notice. To hold otherwise would, I think, be to disregard the plain and explicit inhibition contained in that section.

The case of *Clinkenbeard et al. vs. United States*, 21 Wallace, 65, was cited on the argument by the learned counsel for complainants. The scope of the decision in that case is not to be enlarged beyond what is actually decided. The ruling there is not that the distiller could have maintained a suit to restrain the collection of the tax, notwithstanding the prohibition of Section 3,224. Certainly this is not its effect, unless it be determined that the assessing officer in that case was wholly without jurisdiction to make the assessment for the period in question, and so that his act was a nullity. In that case the Government attempted the collection of the alleged tax, not by distraint, but by action of debt upon the distiller's bond. The court held that the illegality of the tax could be set up as a defense to the action. Against this position were invoked the provisions of the statute, which declared that no suit shall be maintained for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been made to the commissioner, and his decision had. And the court, in construing that section, held it inapplicable, because "the suit thus prohibited is a suit brought by the person taxed to recover back a tax illegally assessed and collected." Mr. Justice BRADLEY says further: "This is different from the case now under consideration, which is a suit brought by the Government for collecting the tax, and the person taxed (together

with his sureties) is defendant instead of plaintiff. No statute is cited to show that he cannot, when thus sued, set up the defense that the tax was illegally assessed, although he may not have appealed to the commissioner." From this language it seems clear that if the suit had been one brought by the distiller to restrain the collection of the tax, the court would not have hesitated to say that it was within the prohibition of the statute, and could not be maintained. The closing remarks of the court in the opinion clearly indicate this. "When the Government elects to resort to the aid of the courts, it must abide by the legality of the tax. When it follows the statute, its officers have the protection of the statute, and parties must comply with the requirements thereof before they can prosecute as plaintiffs."

But it is alleged in the bill that on the 7th day of October, 1875, proceedings were instituted by the United States, for the forfeiture of this distillery, on the ground of alleged infractions of the law, and that a seizure of the same was made; that Rindskopf, then the owner, intervened, and procured the appointment of appraisers, and a release of the property on bond, pursuant to Section 3,331, of the Revised Statutes, which authorizes such proceeding where there is live stock depending on the products of the distillery for feed, and which would suffer injury if the business of the distillery should be stopped. Further facts are, that subsequent to the seizure, an information was filed, and thereafter the proceedings were abandoned and discontinued, and notice of discontinuance was given. It is contended, on the part of complainants, that the release of the distillery on bond, in the forfeiture proceeding, operated as a release of the property from any lien for unpaid taxes; and that the Government is now estopped to assert such lien, and must pursue its remedy on the bond. In support of this position, the case of *United States vs. Mackoy*, 2 Dillon, 299, has been

confidently submitted as a conclusive authority. It is important, therefore, that the case cited be particularly and closely examined.

Mackoy purchased a distillery, and subsequently Mackoy & Co. began the business of distilling and continued the business until the distillery was seized by the collector for violation of the revenue laws. An information was filed, and the property was released to Mackoy & Co., upon bond given as required by law, which bond was conditioned to the effect, that if the property should be condemned as forfeited, the obligors would thereupon pay into court the appraised value thereof. Pending the proceedings to have the property declared forfeited, Mackoy and Co. were adjudicated bankrupts. Subsequent to the commencement of bankruptcy proceedings, a trial was had in the forfeiture case, and a *judgment of forfeiture and condemnation was entered*, which was followed by judgment against the sureties on the bond which had been given for the release of the property. The sureties then moved that the property be ordered to be sold under the judgment of condemnation, and that the proceeds be applied to the satisfaction of the judgment rendered against them. The assignee in bankruptcy also filed a petition for an order authorizing him to sell the property under Section 25 of the bankrupt act. The motion made on behalf of the sureties was overruled, and the court directed the marshal to sell the property and return the proceeds into court for future order. Accordingly the property was sold by the marshal to one Mageath, which sale was confirmed, and a deed was executed to the purchaser. Subsequently an action was commenced by the Government on the distillery bond to recover taxes assessed against the distillers and unpaid. A bill in chancery was also filed on the part of the United States, reciting the proceedings in the District Court, making the assignee in bankruptcy, various lien creditors of

Mackoy & Co., the sureties on the bond given on release of the property from seizure, and the purchaser of the distillery, defendants, and asserting a lien on the property for unpaid taxes, and asking to have the property subjected to the payment thereof. The question was, whether upon the facts so appearing, the bill could be sustained; and it was held that all of the interest of the United States in the property sold, passed to the purchaser, that the United States was estopped to set up as against the purchaser any lien thereon for taxes in existence, and known to it at the time the order for sale was made, and the bill was dismissed.

Now, in this case, there were certain distinguishing features, which clearly controlled the disposition made of it, and which are not to be overlooked.

First—The forfeiture proceedings were prosecuted to judgment of condemnation, and there was a full judicial declaration of forfeiture to the Government. By the judgment it was necessarily determined and decreed, that the alleged causes of forfeiture existed, and that the acts had been committed which produced a forfeiture, and in consequence vested the ownership of the property in the United States, at the time of the violations of law.

Second—The liability of the sureties on the bond for release became fixed, and judgment was rendered against them for the amount of the appraised value of the property.

Third—The purchaser acquired his title, not from the original owner, but under a judicial sale, which was confirmed by the court, and which was followed by a marshal's deed to such purchaser, who at once made large improvements upon the property.

Fourth—The United States consented to the sale ordered by the court, and at that time, its bill asking to have the taxes declared a lien upon the distillery property, was pending. In his opinion, Judge DILLON expressly says, that the

sale was made with the consent and for the benefit of the United States, and that it was plain upon the evidence: "That it was the intention to sell, to whomsoever should purchase, a clear and perfect title, and that the parties interested should litigate thereafter over the proceeds of such sale." Further, the court says: "There is no evidence to show that the United States intended to keep alive a tax lien upon the property. On the contrary, there is evidence that it abandoned the proceedings by which the property had been seized to secure the taxes now sought to be enforced, and the district attorney was instructed to commence suit on the bond."

Under the circumstances, the judgment of Judge DILLON was, that the marshal's deed passed and conveyed to the purchaser all of the interest of the United States in the property, and that the United States was estopped to set up as against the purchaser any lien thereon for the taxes claimed to be due.

The case, then, was such as has been stated. Does it rule the case at bar? In my opinion it does not. The cases are dissimilar in essential particulars. Here, although forfeiture proceedings were begun, they were never prosecuted to judgment. There was no judicial declaration of forfeiture. There was no judicial ascertainment of the facts necessary to exist as the basis of a forfeiture and the existence of which was essential in order to vest the title of the property in the United States at the time of any violation of law. The proceedings were discontinued. Necessarily the bond fell with the proceedings, because necessarily the terms of the bond and the obligations of the sureties must have been, that the principal should answer and perform the ultimate decree of the court; and if no decree should be rendered because of a discontinuance of the cause, the bond would cease to have any effect and its life would then terminate. Here, too, the

sale was by the original owner. The United States was not a party to it; it did not consent to it. It was not a sale for its benefit as in *United States vs. Mackoy.* The United States did no act evidencing an abandonment of any lien for taxes upon the property.

It is true that in the opinion of the court in the case referred to, it is stated that "the effect of a release of the property on bond is that it may be sold *bona fide*, and give the purchaser a good title, or liens or rights may be acquired after such release, which will be protected." But this enunciation should be considered in connection with the facts of the case then before the court, and with which the court was dealing. And the scope of the decision is not to be enlarged beyond what it was necessary to decide upon the case presented. In that case the proceeding being prosecuted to judgment of condemnation, and the liability of the sureties being fixed by the adjudication of the court, undoubtedly the effect of the release on bond was such as the court pronounced.

Further, the court, in its opinion, speaks of the property as owned by the United States at the time of the violations of law for which it was seized. It must be borne in mind that there was a judgment of forfeiture and condemnation, and, therefore, it was judicially ascertained that the facts existed, that the violations of law had transpired which, *eo instanti*, divested the title of the original owner.

In the case at bar there was no such ascertainment of facts, but a discontinuance of the forfeiture proceedings, the bond, in consequence, then and thereafter, ceasing to have any force or effect.

In the case of *United States vs. Turners and Stoltz, supra*, the spirits upon which the tax was unpaid were removed upon transportation bonds and sold in the market. It was claimed not only that Stoltz was an innocent purchaser

for value without notice, but that the lien of the United States upon the distillery was discharged by taking the transportation bond. But Mr. Justice SWAYNE, as we have seen, held the lien upon the distillery premises valid as against an innocent purchaser, without notice, for value. And in that case as in this, the title of the purchaser had its source in the former owner.

Considering this case upon all the points presented by the bill and on the argument, I have been unable to reach any other conclusion than, that to continue the preliminary injunction granted in this cause, would be to disregard a statute which forbids any such restraint upon the collection of a tax in favor of the Government.

Motion to dissolve injunction granted.

JOHN B. HARVEY vs. THE EVANSVILLE, CAIRO AND MEMPHIS STEAM PACKET CO.

CIRCUIT COURT—DISTRICT OF INDIANA—OCTOBER, 1877.

EXPERT TESTIMONY—COMPENSATION.—The fact that an expert requires payment for his opinions as such, should not discredit him before the jury, as he is not bound to come into court and testify for ordinary witness fees.

Azro Dyer and *James M. Shakelford*, for plaintiff.

Denby & Kumler, for defendant.

GRESHAM, J., in charging the jury said.—Much has been said about the testimony of the witness Hill, who testified solely as an expert. He was brought here by the defendant, and he admitted that he was to be paid for his time and opinions. You heard him testify in chief and under cross-examination. The mere fact that an expert requires pay for the opinions which he gives to the jury does not of itself discredit him. The jury have a right to know what relation he sustains to the parties, and the subject matter of controversy. It is for them to say, from all the evidence, whether he is biased in favor of one side or the other.

Men who have informed themselves by long and patient study and observation in any particular department of art or science cannot be compelled to come into court and give their opinions as experts on controverted questions for the ordinary witness fees.

They have the same right to charge for their advice and opinions as other professional men.

If, therefore, you believe that Mr. Hill had special knowl-

edge on the subject of steam, machinery, boilers and boiler explosions, and that he gave his opinions honestly and without bias, you will give his testimony such credit as his skill and knowledge entitles it to. If, on the other hand, you think that he was influenced by bias or prejudice, you will know how to weigh his opinions.

NATIONAL BANK OF MADISON vs. JACOB DAVIS *et al.*

CIRCUIT COURT — DISTRICT OF INDIANA — OCTOBER, 1877.

1. USURY—NATIONAL BANKS—RENEWAL OF NOTES.—Where a national bank discounts a note, reserving a usurious rate of interest, and the borrower gives a new note in renewal at legal interest, the bank is entitled to recover the amount of the renewal note, with interest, less the amount of the usury reserved on the original discount, credited as of that date.

2. STATUTE OF LIMITATIONS.—Usury, paid more than two years before the commencement of the suit, cannot be recovered nor credited upon the principal of the note.

Assumpsit on a promissory note. The plaintiff, on the 19th of May, 1869, for the defendant, Jacob Davis, discounted his note for $3,000 at four months, with two indorsers, at the rate of 12 per cent. per annum, paying Davis the proceeds less $128.50, the interest reserved.

There were divers renewals of this note, each renewal being for the full amount of the principal, Davis actually paying the interest in advance, the bank reserving nothing out of the proceeds of the discount.

The indorsers were accommodation indorsers, and there were different indorsers upon different renewals.

In 1873, Davis paid $700 on the principal, thus reducing his loan to $2,300, for which sum four different renewal notes were given.

On December 9, 1873, Davis paid on one of these renewals 12 per cent. interest in advance. This was the last usurious interest paid. From that date the plaintiff received only legal interest at the rate of 10 per cent. per annum.

On April 1, 1875, Davis renewed his loan by giving his two notes for like amounts, maturing at different dates, and the note sued on was given in renewal of one of these notes.

C. E. Walker and *C. L. Holstein*, for plaintiff.

Herod & Winter, for defendant.

GRESHAM, J.—Section 30 of the National Bank Act,[1] approved June 3, 1864, reads as follows:

"SECTION 30. And be it further enacted, that every association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more, except that where, by the laws of any State, a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized in any such State under this act. And when no rate is fixed by the laws of the State or Territory, the bank may take, receive, reserve or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt has to run.

"And the knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or

[1] 13 U. S. Statutes at Large, 108.

their legal representatives, may recover back in any action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same: *provided*, that such action is commenced within two years from the time the usurious transaction occurred. But the purchase, discount or sale of a *bona fide* bill of exchange, payable at any other place than the place of such purchase, discount or sale, at no more than the current rate of exchange for sight drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

If a national bank discount a note at a usurious rate of interest, paying the borrower the proceeds less the interest, and suit be brought to recover the loan, and the borrower plead the usury, the bank will recover the face of the note less the entire interest taken out, received or reserved, and no more. It will thus collect the sum of money it actually paid out, being punished for receiving interest in excess of the legal rate by forfeiting all interest. But if the note thus discounted be renewed for the same amount, the borrower paying usurious interest out of his pocket in advance, and suit be brought on the renewed note, the defendant may recoup double the amount of the entire interest actually paid on renewal, or in an independent action of debt he may recover from the bank double the amount of the entire interest thus paid.

In either case the punishment of the bank is the same. In the latter case the bank forfeits double the amount of the interest paid, and yet recovers the amount it actually paid out, for it will be remembered the note sued on includes the amount of interest originally reserved. True, if the note be renewed in the same manner more than once, and the borrower be allowed to recoup, or in an independent action, recover double the amount of usurious interest paid, the bank will lose part of the principal as well as all of the interest. But forfeiture of double the entire interest paid is barred after the lapse of two years.

If, instead of paying the usurious interest at each renewal

of the loan, the same be added to the principal and included in the renewal notes, the bank, if the usury be pleaded, will recover the amount it originally paid to the borrower; that is to say, it will recover the amount of the last of the renewal series sued on, less all interest included in it.

Usury forfeited the entire loan or debt under the banking act of February 25, 1863. This, Congress thought, was too severe, and the act of 1864, with the exception already noticed, limits the forfeiture to the interest only.

In the case of *Farmers, etc., National Bank vs. Dearing*, 1 Otto, 29, the court say: "In the act of 1864 the forfeiture of the debt is omitted, and there is substituted for it the forfeiture of the interest stipulated for, if it had only been reserved, and the recovery of twice the amount when the interest had been actually paid."

The only forfeitures visited upon national banks, when they stipulate for or receive illegal interest, are those found in the banking act. They are not subject to any penalties or forfeitures contained in state statutes.[1]

It is a familiar principle that forfeitures are never favored.

All actual payments in excess of the legal rate were made more than two years before the defendant's plea of usury was filed, and, in fact, more than two years before this suit was brought. The plaintiff is entitled to recover the amount of the note in suit with interest, less $128.50, the interest reserved on the original discount, which is to be credited as of the date of the reservation, all other interest having been actually paid.

DRUMMOND, J., concurring.

[1] *Farmers, etc., National Bank vs. Dearing*, 1 Otto, 29.

FREDERICK STRAUSE *et al.* vs. WESTERN UNION TELEGRAPH COMPANY.

CIRCUIT COURT—DISTRICT OF INDIANA—NOVEMBER, 1877.

1. LIABILITY OF TELEGRAPH COMPANY.—A telegraph company, negligently delivering forged dispatches, is liable for the damage thereby sustained.

2. FORM OF ACTION.—Where the dispatch was concerning the payment of a forged draft, the fact that the plaintiff had a remedy *ex contractu* against a solvent indorser, is not a bar to an action *ex delicto* against the company, and it is not necessary to sue the indorser first.

The declaration alleges that the plaintiffs are copartners and private bankers under the firm name of "The Citizens' Bank," at Ligonier, Indiana; that on the 25th day of December, 1875, a bill purporting to have been drawn by the Citizens' National Bank of Peru, Indiana, on Winslow, Lanier & Co., at New York, for $2,180, was presented at the plaintiffs' bank to be discounted; that the plaintiffs at once telegraphed to the Peru bank, asking if the draft was genuine, in answer to which telegram the Peru bank delivered to the defendant a dispatch saying, "it had drawn no such bill;" that the last named dispatch was sent over the defendant's wires from Peru to Ligonier, the plaintiffs paying the usual charges therefor; that on the receipt of the dispatch at Ligonier, the defendant placed the same in the hands of a messenger, to be delivered to the plaintiffs, but instead of delivering the genuine dispatch the messenger carelessly permitted a false and forged message saying the bill was correct, to be substituted therefor which forged dispatch was duly delivered to the plaintiffs; that believing the forged dispatch was a reply from the Peru bank to the plaintiffs' dispatch, and in

good faith believing the draft to be genuine, the plaintiffs paid out on the same the sum of $1,500 and issued their certificate of deposit for the balance. Judgment is demanded for $2,500.

In its third plea, the defendant alleges that the draft was on its face payable to L. W. Lane; that before any of the messages described in the declaration were delivered to the defendant for transmission, the draft had been indorsed by Lane to George Sackett, who after indorsing the same in blank had offered it to the plaintiffs for discount; that Sackett was at that time well known to the plaintiffs as a man of financial responsibility; that the money paid out on said draft was paid to Sackett; that no demand has been made on Sackett for said money, and no suit has been brought against him on his indorsement, although the defendant has often notified the plaintiffs to sue the indorser; that no tender of said draft has been made to the defendant, whereby it might be subrogated to the rights of the plaintiff; that the plaintiffs never protested the draft nor gave notice to Sackett of the dishonor thereof; that Sackett is still solvent; and that it is liable to the plaintiffs, in damages in the amount paid for the Peru bank's dispatch—namely, fifty cents and no more, which sum it tenders and brings into court. The fourth plea sets up the same facts in bar of the entire cause of action.

Demurrers to both pleas.

Baker, Hord & Hendricks and *J. C. S. Mitchell*, for plaintiffs.

McDonald & Butler, for defendant.

GRESHAM, J.—On the facts here stated the plaintiffs had a remedy against the defendant for its negligence, also against

Sackett on his indorsement. There is no privity between Sackett and the defendant. If liable at all, the one is bound by his contract of indorsement while the other is liable as *tort feasor*. There is no right of subrogation in favor of the defendant against Sackett. Even if the defendant had paid the demand I am not able to see on what ground it could be subrogated to the rights of the plaintiffs against Sackett. So far as the pleadings are concerned Sackett was no party to the fraud which was successfully practiced against both the plaintiffs and the defendant. The presumption is that Sackett was a *bona fide* holder of the forged draft for value. In fact it was conceded in the argument that Sackett did not participate in the fraud, and that he was induced to sign the draft for accommodation. There is no equity in favor of the defendant against Sackett, and there is no relation of privity between them.

It is further urged by counsel for the defendant that when one person is injured by the fault of another the latter is liable for such damages only as are sustained after the injured party has used reasonable care and precaution to protect himself against the consequences of the negligent or injurious act. The soundness of this proposition cannot be questioned, but the authorities relied on to sustain it do not support the pleas even by analogy.

The defendant admits its negligence but insists that, because the plaintiffs had the genuine indorsement of Sackett, who was and still is solvent, the measure of damages is the amount paid for the dispatch sent by the Peru bank, namely, fifty cents.

If a railroad train is wrecked by the carelessness of a drunken engineer, the injured passengers have two remedies, one against the engineer for the *tort*, and the other against the company on contract. In an action by a passenger in such a case against the engineer, the latter would not be

allowed to plead against all but nominal damages, that the passenger has a remedy against the solvent carrier.

If it be the law that the plaintiffs are damaged only to the amount paid for the dispatch, they holding the genuine indorsement of Sackett, then the forger himself, in an action of *tort*, would be liable for the amount the plaintiffs paid for the dispatch and no more.

Sackett's indorsement is worth just as much in the plaintiffs' hands against the forger as against the telegraph company.

A *tort feasor* is liable for the damages sustained by the injured party, and that, whether the law gives the plaintiff a remedy against other parties or not. When a wrong-doer is sued he is not allowed to plead to all but nominal damages, that by suing other solvent parties either in an action of *tort* or on contract the plaintiff can recover full compensation for the injury. Demurrer sustained.

In re ROBERT HUGHES *et al.*

DISTRICT COURT—WESTERN DISTRICT OF WISCONSIN—NOVEMBER, 1877.

IN BANKRUPTCY.

EXEMPTIONS IN WISCONSIN—PARTNERSHIP STOCK.—Where there has been an adjudication in bankruptcy against a mercantile partnership and the assets of the firm turned over to the assignee, the individual partners are not entitled to claim as exempt, under the statute of Wisconsin, the sum of two hundred dollars each, out of the partnership stock.

Lanyon & Spensley, for assignee.

In re Robert Hughes.

BUNN, J.—This case is certified to this court by the Register in Bankruptcy for its decision upon the following question:

Hughes & Teague were partners doing a general merchandise business at Mineral Point, Wisconsin. In September, 1877, as such partners, and without having severed their interest in the partnership goods, they filed a joint petition in bankruptcy, and were thereupon adjudged bankrupts, and their entire stock and effects assigned to the assignee. Afterwards the several partners filed a claim to be allowed each the sum of two hundred dollars as exempt out of the general stock of partnership goods in the hands of the assignee, naming the articles at length which each claimed, and demanded that the assignee deliver and surrender to each the articles so severally claimed by them as exempt under Section 14 of the Bankrupt Act.

The question is: Are the goods so claimed, exempt under the law? The language of Sub. 9, Section 30, Chapter 34, Revised Statutes of Wisconsin, is: "The *tools and implements*, or stock in trade, of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business, not exceeding two hundred dollars in value." It has generally been held in this State that an individual merchant may, under this provision, hold two hundred dollars of his stock as exempt, though the Supreme Courts of Minnesota and Kansas, under statutes similar but not identical in terms, have held that the provision did not extend to this class of traders; and a strong argument might be made, upon the language of the statute, that it was intended to apply only to mechanics, miners, or other persons similarly situated and requiring tools and implements, and *perhaps* stock in trade, to carry on their business, such as well-diggers and the like. Otherwise, according to a familiar rule of construction, why should not the merchant have been

mentioned, which is quite as prominent a class, as well as the mechanic and miner, and not left to be included by inference under the term "other persons"?

But, conceding that a more liberal interpretation would allow an individual merchant the exemption, does the right extend to each and all the members of a partnership firm so that the exemption may be doubled and quadrupled and indefinitely multiplied, according to the number of the partners, and without any reference to the amount of actual or equitable interest they may severally have in the partnership assets, how much capital each has contributed to the firm, or the condition of the accounts as between themselves, or as between them and the creditors, at the expense and perhaps ruination of the joint creditors' claims? If this were any way an open question, I should have no hesitation in saying that such a claim could not be sustained; that the exemption is a personal privilege given to a debtor who owns the goods, and was never intended to apply to mercantile partnerships or corporations. One partner cannot be said to be the owner of the goods held by the firm; he has no exclusive interest in them. It is entirely uncertain whether any of them will belong to him until the affairs of the partnership are wound up. But I think the question must be considered as settled and rightly so upon reason and authority, by the cases following: *In re Blodget*, 10 Bankruptcy Register, 145; *Pond vs. Kimball*, 101 Massachusetts, 105; *Guptil vs. McFee*, 9 Kansas, 30; *In re Price*, 6 Bankruptcy Register, 400; *In re Boothroyd & Gibbs*, 14 do. 223; *In re Handlin & Venny*, 12 do. 49; *In re Stewart & Newton*, 13 do. 295.

But it is claimed by the bankrupts in this case that the rule is otherwise settled in this state by the case of *Russell vs. Lennon*, 39 Wisconsin, 570. But I do not so understand that case. I do not see that that case is at all in conflict with the general current of authority as settled in the above

cited cases. In that case the plaintiffs were partners doing a business as tinners and jobbers. The defendant as sheriff levied on the partnership property in their store to satisfy a judgment against the firm. Thereupon the partners made a claim for an exemption of two hundred dollars each from the partnership goods, and brought a joint action to recover the goods so claimed from the sheriff. The Circuit Court gave judgment for the plaintiffs, sustaining the claim thus made. The question was whether the judgment was right. The Supreme Court held that the action could not be maintained, and reversed the judgment. And this is all that the case decides. It is true the court says, in the opinion, that there appeared to be no doubt that if the respondents had held the property in equal moieties in severalty, they would have been entitled to hold each his share as his exemption under the statute. And in another part of the opinion they say, "We have no doubt that, in proper cases, each member of a partnership is entitled to his separate exemption out of the partnership property; and that the partnership property, after levy, may be severed by the partners, so that each partner may have his several exemption." The court had no occasion to define, and did not undertake to define, just what those proper cases were, in which each member of the firm would be entitled to his separate exemption out of the partnership property; but it is evident that when they arise they must be cases where "the partnership property *after levy may be severed by the partners.*" It is enough to say that this is not one of the cases referred to in that opinion. The partners in this case do not "hold the partnership property in equal moieties in severalty." It is not a case in which "the partners after levy may sever their interests in the property." There is no levy, and the partners have no interest in the property capable of severance. They have, in fact, no interest at all, except the contingent and uncertain one of a

right to any surplus that may remain after paying all expenses and disbursements in the bankruptcy proceedings, and the claims of partnership creditors.

It is conceded that there was no severance of the partners' joint interest in the partnership property in this case previous to the adjudication in bankruptcy. But that event dissolved the partnership and transferred the title to all the partnership property, except such as was exempt at the time of the adjudication, to the assignee. So that, if there was no severance at the time of the adjudication, so as to entitle the several partners to the exemptions, there could be none afterwards.

All that case decides, is that copartners cannot under the exemption law in question, and claiming for each an exemption of two hundred dollars, maintain a joint action to recover partnership goods taken under an execution issued against the partnership. The court holds that the principle of exemption, as well as the provisions of the statute, are personal, and they cite with approval the case of *Pond vs. Kimball, supra.*

The decision of the court is that the claims of the bankrupts to an exemption of two hundred dollars each, out of the partnership property, under the exemption laws of this state and the Bankrupt Law cannot be allowed.

In re WILLIAM N. ROSEBERRY *et al.*

DISTRICT COURT—DISTRICT OF INDIANA—NOVEMBER, 1877.

IN BANKRUPTCY.

1. SALE BY LIEN-HOLDER—BANKRUPTCY.—Where one has a valid lien upon property in his custody belonging to another who is on the eve of bankruptcy, and sells the same with the knowledge that bankruptcy is imminent, the sale will not be afterwards disturbed by the court in bankruptcy if untainted by fraud, and if there has been no sacrifice of the property.

2. FACTOR'S LIEN PROTECTED.—The lien of a factor for his advancements, charges and commissions, is within the meaning of the amendment to Section 5,128, Revised Statutes of the United States, which provides that nothing in that section shall be construed to invalidate securities taken in good faith upon the making of a loan, and will be protected in bankruptcy.

Goss, Newsom & Co. proved claims against the individual estates of each of the bankrupts, who, previous to the adjudication in bankruptcy, were partners as W. B. Roseberry & Co. Upon the application of the assignee, these claims were re-examined before the register pursuant to the terms of Rule 34 of the Supreme Court. In the course of the re-examination it was shown that Goss, Newsom & Co. were pork packers and commission merchants, who made advancements of money for the purchase of hogs that were afterwards packed by them. Usually they entered into articles of agreement with the parties to whom these advancements were made, stipulating for the retention of a lien upon the hogs to secure their reimbursement with interest, and the payment of their charges and commissions. They had such an agreement with Warren B. Roseberry, and, for additional

security, he executed to them bills of exchange with William N. Roseberry as indorser thereon. They had no such agreement with William N. Roseberry, but dealt with him in their capacity as factors. The other facts of the case are stated in the opinion of the register.

BUTLER, REGISTER.—As to the claim of Goss, Newsom & Co. against Warren B. Roseberry, they unquestionably had, by virtue of their written agreement with him, a lien upon the product of his hogs for charges and advancements made by them to him. They had the right, upon his failure to pay or renew the bills that were given for these advancements, etc., to sell this product and apply the proceeds of the sale on his indebtedness to them. It makes no difference that when they made the sale they had reasonable cause to believe that he was on the eve of bankruptcy. The lien already existed; it was created under circumstances that entitle it to the protection of the bankrupt law; it was a security taken upon the making of a loan.[1] Unless it were made to appear that there was some actual fraud in the sale, by means of which the property was sacrificed, the court in bankruptcy would not interfere with it. On the contrary, it is shown by the testimony in this case that the property was sold for the full market price. Their claim against Warren B. Roseberry is therefore properly credited with the proceeds of the sale of his product.

But this claim is also credited with the sum of three hundred and twelve dollars and thirty cents, which is a balance due William N. Roseberry on an account between them and him, and which, it is claimed, was transferred to their account with Warren B. Roseberry in accordance with the terms of a verbal agreement with William N. Roseberry, who was at the time liable to them as an indorser of Warren

[1] § 5,128, Revised Statutes of the United States.

B. Roseberry's paper. This agreement is denied by William N. Roseberry, and I do not think it is made out by the evidence. This sum was really due William N. Roseberry on the commencement of these proceedings, and ought to be recovered by his assignee in bankruptcy. The credit of three hundred and twelve dollars and thirty cents ought, therefore, to be erased from their claim against Warren B. Roseberry, and their said claim increased in this sum.

Interest is due upon this claim until the filing of the petition in bankruptcy only, and a reduction of —— dollars ought to be made on account of an overcharge of this amount by way of interest.

As to their claim against William N. Roseberry, they had no written or other express agreement with him, and made no advancements to him for the purchase of hogs, as they did in the case of Warren B. Roseberry. But in their capacity of pork packers they received from him a consignment of hogs which they were to pack in accordance with the custom of their house and the general usage of pork houses, with which the bankrupt testifies he was well acquainted. They were to pack and sell them for him; and as factors, independently of any positive agreement between them, they had a lien on the product for their charges and advancements.[1] While the product was lying in their warehouse the bankrupt gave orders on them for two thousand and ninety dollars in favor of a third party, which they paid; and it is fair to presume that, in giving the order and in paying it, the expectation of both parties was that the product was to be held as security therefor. There were no restrictions upon the claimants as to the time of sale, and, as in the case of their claim against Warren B. Roseberry, it really is unaffected by the fact that it was made when they had reason to

[1] Story on Agency, §§ 376, 377, 378.

believe that bankruptcy was imminent. They had a lien that would have been protected in bankruptcy, and the sale being free from fraud, and the bankrupt being credited upon their account with him with the full value and market price of the property, the sale will not be disturbed by the Bankrupt Court.

After applying the proceeds of the sale of this product of William N. Roseberry to the payment of their charges and advancements to him, there remained a balance of three hundred and twelve dollars and thirty cents, which they transferred to the account with Warren B. Roseberry, and credited him with it. This, as already stated, they had no right to do. It belonged to William N. Roseberry, and ought to be paid to his assignee.

Gresham, J. — Register's finding approved, and order accordingly.

If brokers, carrying a stock on a margin, which at the time of the commencement of bankruptcy proceedings could have been sold at a profit, carry it until a decline, and then close it out at a loss without application to the court, they cannot prove against the estate their claim for difference. *In re Daniels*, Vol. 6 of this series, 405. [*Reporter.*

In re JAMES BENSON.

DISTRICT COURT—DISTRICT OF INDIANA—NOVEMBER, 1877.

IN BANKRUPTCY.

1. BANKRUPTCY—ESTATE IN ENTIRETY—DIVORCE.—Real estate was conveyed to A. and B., husband and wife, to be held in entirety. A. subsequently went into bankruptcy, and between the date of the adjudication and his discharge B. obtained a divorce. The assignee in bankruptcy of A. claimed one-half interest in the land as the property of A.

2. *Held*, that in Indiana the common law rule as to tenants by entirety has not been changed, except that the husband, under the statutes of that State, does not acquire any legal interest or estate in the lands of the wife.

3. *Held*, that when the adjudication in bankruptcy was made, A. had no interest in the real estate which passed to his assignee, and that if he gained an alienable interest by the divorce, it was a new acquisition subsequent to the adjudication, which cannot be claimed by the assignee.

4. Effect of divorce discussed, but not decided.

De Bruler & Hatfield, for bankrupt.

James M. Warren, for assignee.

GRESHAM, J.—In this case the assignee presents his petition for an order to sell the interest of the bankrupt in certain real estate. On behalf of the bankrupt this application is resisted.

The facts are not matter of dispute, and are substantially as follows:

The real estate in question is situated in this district. The adjudication of bankruptcy was made March 29, 1877. The estate is largely indebted, and there are no assets unless this real estate is assets. March 4, 1870, one Kirkpatrick con-

veyed to the bankrupt and his wife, Margaret, the land in question, to be held in entirety. In August, 1877, the Perry Circuit Court decreed a divorce to Margaret Benson. No discharge had been granted to the bankrupt. Counsel for the assignee insist that at the date of the adjudication the bankrupt had an interest in said real estate, which was subject to levy and sale upon execution; that this interest passed to the assignee by virtue of the deed of assignment, and that the decree of divorce made Benson and his wife tenants in common, the effect of destroying the marital relation being to sever the estate in entirety.

On the other hand, it is urged by the counsel for the bankrupt that at the time of the adjudication the husband had no such interest in the land as could have been seized and sold upon execution against him; that consequently no estate in it passed to the assignee; and that, if by a subsequent divorce any new or different holding was created by reason of the changed relation of the tenants, that was the creation of an interest after the bankruptcy, and so vests in the bankrupt unaffected by his deed of assignment.

The statute of Indiana on the subject reads as follows[1]:

"SECTION 7. All conveyances and devises of lands, or of any interest therein, made to two or more persons, except as provided in the next following section, shall be construed to create estates in common, and not in joint tenancy, unless it shall be expressed therein that the grantees or devisees shall hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear from the tenor of the instrument that it was intended to create an estate in joint tenancy."

"SEC. 8. The preceding section shall not apply to mortgages nor to conveyances in trust, nor when made to husband and wife; and every estate vested in executors or trustees as such shall be held by them in joint tenancy."

In *Davis vs. Clark*, 26 Indiana, 428, the Supreme Court

[1] 1 Gavin & Hord, §§ 7, 8, p. 259.

of Indiana, considering these sections of the statute, uses this language: "At common law, if an estate is granted, as in this case, to a man and his wife, they are neither properly joint tenants nor tenants in common; for husband and wife being considered one person in law, they cannot take the estate by moieties; both are seized of the entirety *per tout*, and not *per my*. Neither can dispose of any part of the estate without the assent of the other, but the whole must remain to the survivor."

The court, in the same case, decided that the statute has not changed this common law rule, but has expressly recognized it; that the husband does not under the statutes of that state acquire any legal interest or estate in the lands of the wife, but the same, and the profits thereof, remain her separate property; and that when land is conveyed to husband and wife, the former has not such an estate in the lands as is subject to sale upon execution. The right of survivorship does not constitute a contingent or vested remainder, but is a mere accident of the estate.

To the same effect is the case of *Arnold vs. Arnold*, 30 Indiana, 305. The rule is there settled on a proceeding in partition between the heirs of the deceased husband and the surviving wife that the whole estate remains to the survivor, which is declared to have been the law in this State from the statutes of January 2, 1818. In the same direction is *Simpson vs. Pearson*, 31 Indiana, 1.

There are some other cases in Indiana, and these cases and others in the different states are examined in an elaborate opinion of the Supreme Court in *Chandler vs. Cheney*, 37 Indiana, 391.

The subject is exhaustively discussed, and this conclusion is reached, as is well stated in the head notes: "The same difference which existed at common law between joint tenants and tenants by entireties continues under our statute. In

both the title and estate are joint, and both have the quality of survivorship; but the marked difference between the two is this: In a joint tenancy, either tenant may convey his share to a co-tenant or to a stranger, who thereby becomes a tenant in common with the other co-tenant; while neither by the entirety can convey his or her interest so as to affect their joint use of the property during their joint lives, or to defeat the right of survivorship upon the death of either of the co-tenants. There may also be partitions between joint tenants, but not between tenants by entireties.

"While such an estate exists no interest in it can be sold upon execution for the debts of the husband or wife, but the conveyance creating it may be set aside for fraud."

In this opinion the case of *Ames vs. Norman*, 4 Sneed, 683, is noticed and the ruling therein, that "during their joint lives the husband may dispose of the estate. He may lease or mortgage it, or it may be seized and sold upon execution for his debts," is strongly condemned as being a departure from the settled law and also from the principles which the case itself states in all their strength.

And finally in *Jones vs. Chandler*, 40 Indiana, 588, the same court adheres to its former opinions and holds that "the following clauses in a will: "To my son Algernon R. Jones, his wife and his heirs, seven-thirtieths of all my estate" created an estate by entirety in Jones and his wife, and he could not alienate it nor could it be sold on execution against him to her prejudice.

These decisions settle the question as a rule of property in Indiana.

When the adjudication in bankruptcy was made Benson had no interest in this property which he could alienate. Under the deed of assignment the assignee took no interest whatever, whether present or contingent.

The question of divorce remains to be considered This

separation was decreed some months after the adjudication; and although the statement of facts is by no means full, it is to be inferred that as the divorce was in favor of the wife, it was by reason of the fault of the husband. The question, what is the effect of the divorce under such circumstances, is one of great difficulty.

The statute on the subject, provides that "a divorce granted for misconduct of the husband shall entitle the wife to the same rights so far as her real estate is concerned, that she would have been entitled to by his death."[1] But here at once arises the question, *what is her real estate?* In those instances where her title to real estate is effected by the marriage, the application of this statutory rule presents no serious difficulty. In the estate by entirety, however, the Supreme Court has so defined it as to leave no interest in either husband or wife that one can enjoy separate from the other. Indeed, says the Court, "*there is no separate interest.*"[2] Considered apart from this provision of the statute, and regarding this estate in the light of the decisions above referred to, it becomes exceedingly difficult to determine the effect of the divorce upon it. The tenants whose joint use and whose joint title, extending through the entire interest conveyed, constitute the distinctive characteristics of the tenancy *quoad hoc*, may be left as the decree of the divorce found them. Again, it may be said that such a title, created in view of the marriage relation, founded upon it, and determinable when that relation ends by the death of one of the grantees, is determined by a divorce as absolutely as by death.

But death leaves a survivor. Divorce leaves the two, each having under the original conveyance an equal right. The

[1] Statutes of Indiana, Revision of 1876, Vol. II., p. 330; Chap. 4, Sec. 18.
[2] *Chandler vs. Cheney*, 37 Indiana, 397.

marriage relation, the very ground of a tenancy by entirety, is gone. Does the whole estate thereupon vest in the innocent party? Is the joint holding turned into a tenancy in common? Or does the law leave the divorced husband and wife to quarrel over an interest in land which the law is incapable of giving exclusively to one or dividing between both? Public policy would seem to require that no such anomaly should exist; and that persons who are found by the law to be unfit to live together should have a legal method of settling the controversy which an estate of this nature must, under such circumstances, be sure to kindle.

In this state these questions are not settled. Their settlement belongs more properly to the State Court than to this tribunal, nor do we think it necessary to consider the matter here and in this case. It is enough to know what definition of the estate has been given by the Supreme Court, and that definition makes it a joint estate, not in any manner separable by the act of either joint tenant, which cannot be mortgaged or alienated otherwise than by the joint act of both, and which cannot be seized or sold upon judicial process by the creditors of either. The Supreme Court declares in express terms that there is no separate interest. Now, if the effect of the divorce is, by a dissolution of the marriage, to destroy the unity of possession, and to turn what was a holding *per tout* by husband and wife, into a tenancy in common, it is simply by operation of law the creation of a new interest in the bankrupt, and is to all intents and purposes a new acquisition, subsequent to adjudication, which cannot be claimed by the assignee.

If, on the other hand, the decree of a divorce in favor of the wife for the fault of the husband, vests the whole title absolutely in her as if he were dead, still less has this court anything to do with it.

The petition of the assignee is dismissed.

In re HAMLIN, HALE & CO.

DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS—DECEMBER, 1877.

IN BANKRUPTCY.

1. FRAUDULENT COMPOSITION.—Where the debts against a partnership have been compromised and the firm dissolved, one of the partners has no right afterwards to put the firm into bankruptcy upon allegations of his own fraud in effecting the composition.

2. WHO MAY AVOID.—A composition with creditors fair upon its face, but in fact fraudulent as to part of them, can be set aside only by the creditors who are wronged. The debtor cannot be heard to assert his own fraud as a reason for setting aside such settlement.

3. VEXATIOUS PROCEEDINGS—RIGHT TO DISMISS.—Where it appears that a petition in bankruptcy has been filed by one member of a firm solely for the purpose of vexing and harrassing the other partner, the court has power to dismiss the proceedings.

4. PREFERENCE TO CREDITOR—WHEN MUST BE SET ASIDE.—A preference to a creditor cannot be set aside unless an adjudication in bankruptcy is had within the time limited by the Bankrupt Act.

5. STATUTE OF LIMITATIONS.—The rule of the Illinois Statute of Limitations that the limitation does not begin to run till the fraud is discovered has no application to such case.

Leonard Swett, *Robert Hervey* and *L. H. Bisbee*, in support of rule.

Wirt Dexter, *A. L. Bradley* and *H. H. Thomas*, *contra*.

BLODGETT, J.—In this case F. N. Hamlin on the 13th of April, 1877, filed his petition on behalf of Hamlin, Hale & Co., asking that the said firm be adjudicated bankrupts. The petition was in the usual form, setting out that the firm of Hamlin, Hale & Co. was insolvent, that it con-

sisted of F. N. Hamlin and Robert W. Hale, and that they asked the benefit of the Bankrupt Act, that they were willing to surrender all their property, and asked that on doing so they might be discharged from their debts. On the 14th of May, on a petition filed in behalf of Hamlin by one of his attorneys, a rule was entered that Hale, the partner who had not joined in the petition, should show cause in five days after service, why he and the firm of Hamlin, Hale & Co. should not be adjudged bankrupts.

This rule was returned served, and in the due course of procedure Hale made his answer, denying that the firm of Hamlin, Hale & Co. was insolvent, and denying that he, Hale, was insolvent, and asking that the issue made by his denial might be tried by a jury. At the same time that Hale filed his denial, he also, by leave of court, entered a motion to discharge the rule and dismiss the petition as against himself.

Several reasons were assigned in support of this motion; but I only deem it necessary to consider one, viz.: that the said petition, so far as it asks for an adjudication of the firm of Hamlin, Hale & Co., is a fraudulent attempt on the part of Hamlin, to use the process and jurisdiction of this court for the purpose of annoying and vexing the respondent Hale, and to gratify Hamlin's feelings of revenge and spite against Hale.

The undisputed facts involved in this controversy, as shown by the pleadings and affidavits on file, appear to be these:

For sometime prior to the great fire of 1871, F. N. Hamlin and Robert W. Hale, had been doing business as wholesale and retail dry goods merchants in this city, under the firm name of Hamlin, Hale & Co. Their losses by the fire were very considerable, and in the month of November, 1871, they represented themselves to their creditors as insolvent and unable to pay their debts in full. From rep-

resentations made to their creditors in regard to the extent of their losses by the fire, and their liabilities and assets, their creditors agreed to accept a composition of fifty cents on the dollar on the par value of their debts, and all signed a composition deed to that effect, and the promissory notes of the firm for the commuted amount of their debts to their several creditors were duly executed and delivered, payable in six and twelve months from the first day of November, 1871. This settlement with their creditors was wholly negotiated by Hamlin, and the representations to the creditors by which it was obtained, were all made by him. In January, 1872, the old firm of Hamlin, Hale & Co. was dissolved, and a new firm organized, under the same name, to continue the business, by bringing in two new partners, which new firm continued until November, 1873, when it was dissolved, the two new partners and Hale retiring from the business, and Hamlin organizing a new firm, under the firm name of Hamlin, Davy & Co. All the composition notes and other indebtedness of the old firm of Hamlin, Hale & Co. had been paid long before the dissolution of Hamlin, Hale & Co. in November, 1873, and no creditors of the firm have since sought to set aside or avoid the composition settlement of November, 1871.

Hamlin schedules as the only assets of the firm of Hamlin, Hale & Co.—*First*, "a claim against H. B. Claflin & Co., amount undetermined;" *Second* — "claims against certain insurance companies that are in liquidation arising from losses by fire of October, 1871, for goods burned in the store of Hamlin, Hale & Co., amount unknown; *Third*— "certain book accounts due the firm of Hamlin, Hale & Co., the items of which I am unable to state (the books being in the possession of Robert W. Hale)."

The statement of Hamlin in regard to the claim scheduled against H. B. Claflin & Co. is, in substance, this: that

when the old firm of Hamlin, Hale & Co. failed in the fall of 1871, and sought a compromise with their creditors, they owed the firm of H. B. Claflin & Co., about $870,000 and all other persons about $600,000; that Hamlin having the charge of the financial affairs of his firm, and being the sole partner engaged in negotiating said compromise, as he says, by Claflin's direction, represented the assets of the firm of Hamlin, Hale & Co., at about $350,000 less than they actually were, and represented the firm liabilities to H. B. Claflin & Co., at $350,000 less than they were. The object of this was to enable the firm of Hamlin, Hale & Co., to save $350,000, so as to be able to pay it to H. B. Claflin & Co., and accordingly, wrongfully, but at the direction of Claflin, said false representations were made, and about the amount of $350,000 was saved from the assets of the firm and paid to the firm of H. B. Claflin & Co., in fraud of the rights of the other creditors. This is Mr. Hamlin's statement taken *verbatim* from his rejoinder, as it is called, to Hale's denial.

It also appears that in the spring of 1874 Hamlin assigned to Hale all his interest in the notes and accounts of the old firm of Hamlin, Hale & Co., and that said assignment remains in full force.

It further appears that shortly before the filing of this petition in bankruptcy, and within the past year, Hamlin has, without consideration, obtained from nearly all the creditors of Hamlin, Hale & Co. named in the schedule filed with this petition, an assignment of the claims of said creditors for the fifty per cent. thrown off at the time of said composition, to Hamlin's father, who now holds the same under some pretended trust for the benefit of Hamlin's creditors.

It also appears that since this petition was filed, a large proportion of said creditors have signed papers, stating, in

substance, that after learning of the statement of Hamlin as to the alleged fraudulent character of the composition of 1871, they are still willing and wish to ratify and confirm the same by signing the said paper, while many other creditors have filed affidavits stating that Hamlin obtained said assignments under the pretext that they were to be made for the benefit of the firm of Hamlin, Hale & Co., and for the purpose of legalizing their composition and curing any technical defects in it.

A careful perusal of the papers filed in the case leaves no doubt in my mind that the real controversy in this case is over the alleged claim of the old firm of Hamlin, Hale & Co. against H. B. Claflin & Co., growing out of the settlement; and that there were no debts of the firm of Hamlin, Hale & Co. at the time this petition was filed, unless the old creditors who settled with the firm in the fall of 1871, at fifty cents on the dollar should set aside that settlement on the ground of the fraud alleged to have been practiced upon them by Hamlin, as he alleges, at the instance and for the benefit of Claflin.

We have, then, this statement of the case: Hamlin alleges that a fraudulent settlement was made in November, 1871, between the firm of Hamlin, Hale & Co. and their creditors at fifty cents on the dollar. This settlement was fair on its face, and is only voidable by the creditors at their election. No creditors have so far challenged this settlement, and no steps have been taken of any character to set it aside.

Upon the facts appearing in the case, can the firm of Hamlin, Hale & Co. be said to owe debts? Legally, these debts are all settled and discharged by the deed of composition and the payment of the composition notes, and it is, at least, extremely doubtful whether the act of Hamlin can revive these debts as against his firm, and he demand that the

firm be adjudged bankrupt by reason of his awakened conscience as to the fraud perpetrated by him, no matter at whose instance. The question is, can Hamlin be heard in a court of justice to assert his own turpitude as a reason why this court should take jurisdiction of this matter, and treat the firm of Hamlin, Hale & Co. as still owing debts? Aside from this, we have the fact that so large a proportion of the creditors, after being fully informed of Hamlin's statements that they had been defrauded, have ratified and confirmed the composition, and no creditor is now in this court asking that an adjudication against this firm be had; but, on the contrary, the only person who is pressing this case for adjudication is the petitioner, Hamlin, who has obtained the transfer, to his father for his own benefit, of so large a proportion of the debts, which he proposes to revive against his firm by proclamation of his own fraud. But if the objection above urged to the further progress of this proceeding is not sufficient, it seems to me that the position assumed that this proceeding is carried on by Mr. Hamlin solely for the purpose of harassing his late partner, is abundantly shown by the proofs.

Hamlin had, before he filed this petition, obtained the assignment, without consideration, of a large part of these claims to his father, and they are now held, as he says, for the benefit of his, Hamlin's creditors. This assignment, so procured by Hamlin, must enure to the benefit of the firm, so that we have the spectacle of Mr. Hamlin holding most of the claims against his firm, which he has obtained to be assigned without consideration, seeking to have his firm adjudged bankrupt on claims which he now holds under circumstances which would prevent even the father, as trustee, from proving a claim in bankruptcy against the firm, because he could, under the admitted facts in this case, hardly swear, in making his proofs, that the "said claims were not pro-

cured for the purpose of influencing proceedings in bankruptcy." Every lawyer knows that no claim can be proven in bankruptcy unless this proof is made; and it seems to me very evident that, on all the facts in this case, the court must assume that these claims were obtained with the intent to prosecute and influence proceedings in bankruptcy, such as the election of an assignee in the interest of Hamlin.

The proof is conclusive that a bitter feud exists between Hamlin and Hale, and this fact, taken in connection with Hamlin's action, and direct agency in obtaining the transfer of these compromised claims to his father, and his further statement in his rejoinder to Hale's denial, that he has filed this petition in order that all the facts in regard to the alleged Claflin preference might be brought out, shows to my mind that this petition is not filed in good faith by Hamlin, for the benefit of the creditors of the firm of Hamlin, Hale & Co., and with the intent to surrender the property of the firm, for the benefit of such creditors; but, on the contrary, is solely for the purpose of vexing and harassing Hale and perhaps Claflin & Co., through the process and proceedings of this court, and making gain for Hamlin.

That a court, when it is satisfied its process is being abused and used for sinister, oppressive and vexatious purposes, has power to dismiss the proceeding is fully sustained by the following authorities: *Amsinck vs. Bean*, 22 Wallace, 404. So *In re Robert Morris*, 1 Crabbe's Reports, 95, HOPKINSON, J., says "The judge to whom the power is given to issue the commission has also the power to recall it, if, instead of answering the purposes for which it was issued, it is used as an instrument of fraud and oppression."

In *Ecfort & Petrings vs. Greely*, 6 Bankruptcy Register, 440, Judge KREKEL says that when bad faith appears to be actuating petitioners, "the court will not be slow in ordering them not to come here without clean hands."

The same rule was applied in this court *In re Scammon*, 6 Bissell's Reports, 195, where this court dismissed the petitioner summarily, on motion, on the ground that the petition had not been filed in good faith. The District Courts, sitting as Courts of Bankruptcy, are clothed with all the powers of Courts of Equity to accomplish the purposes essential to the just operation of the system.[1] So, too, the English Chancellors have never hesitated to dismiss cases when satisfied they were brought with the intent to abuse the process of the court or with the purpose of oppressing and vexing the respondents.[2]

It seems to me, then, that upon the admitted facts in this case, the rule against Hale should be discharged. It cannot be said that this firm owes legal debts at this time; for, admitting the frauds upon the creditors alleged by Mr. Hamlin, still no one but the wronged creditors themselves could take advantage of those frauds.

It strikes me, a fair way to test this proposition would be to ask if Mr. Hamlin, by going to one of these creditors and voluntarily paying him the fifty per cent. on the old debt which was thrown off in the composition of 1871, could maintain a suit at law, or in any other form of action, against Hale for contribution. If he could not do that, he certainly cannot revive the old debt as against the firm, and force the firm into bankruptcy. I therefore think this court justified in finding that this proceeding is not prosecuted in good faith; that it is an attempt to abuse the process of this court, which should not be sanctioned or tolerated.

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[1] *Ex parte Christy*, 3 Howard, 312.

[2] Robson on Bankruptcy, 610; *Ex parte Bourne*, 2 Glyn & Jameson, 137; *Ex parte Harcourt*, 2 Rose, 203; *Ex parte Gallimore*, Id. 424; *Ex parte Phipps*, 3 Montagu, Deacon & De Gex, 505; *Ex parte Ashworth*, 18 Law Reports, Equity Cases, 705; *In re Davies*, Law Reports, Ch. Div. Vol. III. 461.

It might also be asked, what is to be gained, so far as the alleged Claflin preference is concerned, by putting this firm into bankruptcy? It was, at most, as far as other creditors are concerned, a preference which could only be set aside in bankruptcy when an adjudication takes place within four or six months from the time the preference is taken. This preference, if taken at all, was taken five and a half years before the petition in this case was filed. It is not denied but that Hamlin, Hale & Co. owed Claflin & Co. all the money paid them; but it is claimed they were paid more than the other creditors. This would make the settlement voidable at common law, as between the debtors and creditors, but it does not give the creditors so defrauded a right of action against Claflin & Co., so that the only right or action which could be maintained in behalf of creditors would be, under the bankruptcy law, if an adjudication had been had against the firm of Hamlin, Hale & Co., within six months after the preference was taken.

Upon the argument of the case it was urged that the limitation did not apply nor begin to run till the preference was discovered, but from a number of cases I have examined, I am of opinion that this rule of the Illinois Statute of Limitations does not apply to proceedings under the Bankrupt Law, and that creditors are obliged to be vigilant in ascertaining whether other creditors have been given a preference or not, and if they do not ascertain that fact within the limited time fixed by the Bankrupt Law, the preference will stand.

The rule is therefore discharged.

GODLOVE O. BEHM vs. THE WESTERN UNION TELEGRAPH COMPANY.

CIRCUIT COURT—DISTRICT OF INDIANA—JANUARY, 1878.

1. DUTY OF TELEGRAPH COMPANY.—It cannot be expected that a message left for transmission with a telegraph company at a small station shall be forwarded and delivered at its destination as quickly as though it had originated at a large office.

2. AT A SMALL STATION, it is not the duty of the company to keep more than one operator, and if a message is left with a messenger during the operator's absence, and the message was forwarded on the operator's return, after a reasonable absence, the company is not guilty of negligence.

3. If the usual line of business between the two points is through a repeating office, the company is entitled to a reasonable time for the delay on account of other business at such repeating office.

4. MEASURE OF DAMAGES.—Where the face of the dispatch does not indicate that the sender is liable to sustain loss if the dispatch is not promptly forwarded, and the company is not so informed, it is liable only for nominal damages.

Action for alleged damages caused by delay in transmitting a telegram from Monticello to Lafayette, Indiana. The telegram was left by the plaintiff with the messenger, at the telegraph office at 11:55 A. M., April 2, 1877, and forwarded by the operator on his return from dinner, at 12:45, and delivered at the office of A. O. Behm, to whom it was addressed, at 3 P. M., a few minutes too late, as plaintiff claimed, to enable the desired transaction to be closed.

John R. Coffroth and *S. A. Huff*, for plaintiff.

McDonald & Butler and *John A. Stein*, for defendant.

GRESHAM, J., charged the jury as to the law as follows: It

was the duty of the telegraph company to send the message with reasonable dispatch. What was a reasonable time for sending a dispatch, you will determine from all the facts and circumstances. It is in evidence and not disputed that Monticello is a small town, where little business was done by the telegraph company; that the usual line for business between Monticello and Lafayette was through Logansport, where there was a repeating office; that on the other line there was only a single wire, used exclusively for railroad business, with no repeating office at Reynolds.

Under the circumstances of this case, one competent operator and a message boy at Monticello was force enough for that office, and it was not negligence in the telegraph company for the operator to leave the office in charge of the messenger while he was absent a reasonable time at dinner; but whether the absence on this occasion was or was not reasonable, is a question for the jury.

It was not the duty of the telegraph company, when the message was left at its office, to forward it to Lafayette as quickly as electricity would carry it.

In determining what was a reasonable time, you will take into consideration what has been already said about the necessary force at Monticello, the absence of the operator at dinner, and the further fact that the message had to go through the office at Logansport, and the delays it was liable to encounter there on account of other business.

If, under the instructions already given, you find that the plaintiff has a cause of action, you will next determine the measure of damages. The dispatch, which was not written upon one of the printed forms of the telegraph company, reads thus: "Take separate deed to Marks for White Fountaine, Tippecanoe and Iowa, 4, and meet me at office at 9 to-night. (Signed) G. O. Behm."

It is not insisted that when the dispatch was left with the

operator at Monticello, he was informed of the nature of the business to which it related. You will remember that the plaintiff sent the dispatch to the office from the hotel, by the boy or young man named Crooks. Was the company informed by the mere reading of the dispatch, of the nature of the contract between the plaintiff and Reynolds, and that the plaintiff was liable to sustain loss if the dispatch was not promptly forwarded and delivered at Lafayette? If not, plaintiff is entitled to no more than nominal damages. It would be unjust to the telegraph company to hold it responsible for damages without limit, when it is not informed by the dispatch itself, or otherwise, that the sender might sustain heavy loss unless the message be transmitted and delivered immediately, or without delay.

If you find that the face of the dispatch informed the telegraph company of the character of the contract between the plaintiff and Reynolds,—if, in fact, there was a contract, and that the same was not fraudulent and void; that there was negligence in forwarding the dispatch to Lafayette; that Reynolds would have complied with the contract on the 2d of April, but for the company's negligence, then the plaintiff is entitled to a verdict for the difference between $300, the contract price, and the fair value of the land bargained for.

But if you find there was nothing on the face of the dispatch to inform the company that the plaintiff would sustain loss if it was not promptly forwarded, and yet you find that the company was negligent, then you will find against the defendant for nominal damages only.

And, if you find there was no negligence in receiving and transmitting the dispatch, you will find for the defendant.

Verdict for defendant, and judgment accordingly.

DAVID OVERMAN, Assignee, vs. JOHN H. QUICK.

Circuit Court—District of Indiana—January, 1878.

1. Chattel Mortgage—Possession—Fraud.—In Indiana a mortgage of a stock of goods, with a parol agreement that the mortgagor should have possession and sell them in the usual course of his retail business, and apply the proceeds of the sale to the payment of the mortgage debt, is not fraudulent and void as against creditors of the mortgagor.

2. Agency.—The mortgagor is, in effect, the mortgagee's agent for the sale of the goods.

Turpie & Pierce, for plaintiff.

Ben. Davis, for defendant.

Gresham, J.—On the 21st day of January, 1876, John H. Quick, administrator of the estate of John S. Rockafeller, deceased, sold to Charles Brown, in pursuance of an order in the Circuit Court of the State, a certain lot of dry goods for five thousand two hundred and forty-four dollars, for which sum the purchaser, on the day of sale, gave his four equal promissory notes, payable, in six, nine, twelve and fifteen months respectively. Payment of these notes was secured by a chattel mortgage executed by the purchaser at the time of sale on the stock of goods. Brown is a citizen of Upland, Grant County, Indiana, and the sale was at Brookville, Franklin County, Indiana, the residence of Quick. Before receiving the goods, Brown informed Quick that he was going to add them to his stock at Upland, and sell them in the usual course of his retail business. Brown agreed, before Quick parted with the goods, that he would apply the proceeds of the sale to the payment of the notes, even before maturity, if he realized fast enough. He also

agreed to collect several outstanding claims due him, and apply the money on this indebtedness. But there was no agreement that the goods should be kept separate from other goods, or that the proceeds of the goods should be kept distinct from other moneys. The agreement was general, to pay the debts from the proceeds of the sale of the goods and collections from outstanding debts as soon as possible, even before maturity, if money was received fast enough. On this agreement Quick shipped the goods, and when received, Brown mingled them with his stock on hand and sold indiscriminately, keeping no separate accounts as to proceeds. Quick paid no further attention to the goods or his contract with Brown, until the 21st of July, 1876, when he inquired by letter, why the first note was not paid, and was informed in reply that owing to the slow sales, and difficulty in making collections, the money was not on hand. Notwithstanding default in payment of the note first due, Brown was permitted to retain possession of the goods, and deal with them precisely as before, until some time in September—just a few days before Brown went into bankruptcy—when Quick went to Marion, the county seat of Grant County, and placed the notes and mortgage in the hands of an attorney with instruction to foreclose. The first note has gone into judgment; the other three are in evidence. No part of the indebtedness to Quick has been paid. The proceeds arising from the sale of part of the goods, Brown, in violation of his agreement, applied on his other indebtedness, or in the purchase of other goods. Brown was adjudged a voluntary bankrupt in September, 1876. The mortgaged goods still on hand, which the assignee was able to identify, were appraised at four thousand four hundred dollars, and by the order of this court were sold by the assignee, and the question in dispute transferred to the proceeds. The master, to whom the case was referred, reported that the mortgage was

fraudulent and void, and that the prayer of the plaintiff's bill asking that it be set aside ought to be granted. The defendant filed exceptions to the master's report.

The Indiana Statute of Frauds declares, that no assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, when such goods are not transferred to the mortgagee or assignee, and retained by him unless such assignment or mortgage is acknowledged and recorded in the recorder's office of the county where the mortgagor resides, within ten days after its execution; and the question of fraudulent intent is in all cases to be deemed a question of fact.[1]

On its face there is no objection to this mortgage, but it is claimed that the verbal agreement allowing Brown to retain possession of the goods and mingle them with his stock on hand at Upland, and dispose of them in the usual course of business without keeping any separate account of sales, rendered the instrument void. The case of *Robinson vs. Elliott*,[2] which went up from this district, is cited in support of this position. In that case the mortgage was given to secure an antecedent debt, and by its terms allowed the mortgagor to retain possession of the goods and dispose of them in the usual course of business, as before, for his own benefit. The proceeds were not to be applied on the mortgage debt. The goods were to be sold for the benefit of the mortgagor, and not for the benefit of the mortgagee. The instrument, therefore, instead of being a security for the mortgagee, was simply a shield for the mortgagor against his other creditors. It could have no other effect. Such an instrument is not intended to perform the office of a mortgage, and is not a mortgage. In the case before us the

[1] 1 Davis' Revised Statutes, 505.
[2] 22 Wallace, 513.

mortgage on its face is free from objection; but after its execution, and before the goods were shipped from Brookville, it was agreed that the mortgagor should add them to his stock in trade at Upland, and sell them first for the benefit of the mortgagee. The agreement was to apply the proceeds to the payment of the notes, even before maturity, if sales were brisk enough. If, in fact, that was the agreement of the parties, and there was no intention thereby to hinder or delay other creditors, the statutes of this State were not violated. It is not claimed by the plaintiff that there was any actual intention on the part of either Quick or Brown to defraud any one by this arrangement. The plaintiff's position is that the agreement was in itself fraudulent, and that was the view of the master.

In delivering the opinion of the court in the case of *Robinson vs. Elliott*, Justice Davis said: "We are not prepared to say that a mortgage under the Indiana statute would not be sustained, which allowed a stock of goods to be retained by the mortgagor and sold by him at retail for the express purpose of applying the proceeds to the payment of the mortgage debt. Indeed, it would seem that such an arrangement, if honestly carried out, would be for the mutual advantage of the mortgagee and the unpreferred creditors." Brown was, in effect, Quick's agent for the sale of the goods; if he violated his agreement by neglecting to pay over to Quick the proceeds of the sales, and misapplied them, it is Quick's loss. Brown's creditors have no right to complain if the proceeds of the goods sold, are credited on Brown's indebtedness to Quick. It was all the same to them whether Brown sold the goods and paid the money to Quick or misappropriated it. In either case Quick is charged with the value of the goods sold as between him and Brown's other creditors.

Quick, in good faith, took a mortgage on the goods sold to

secure the purchase money, at the same time authorizing Brown to sell the goods and account to him for the proceeds to the extent of the four notes. Brown sold part of the goods, but failed to account to Quick for the proceeds, and went into voluntary bankruptcy. Now, it would be manifestly inequitable to say that Quick should not be allowed to take back the goods still on hand and capable of being identified.

I think the proceeds of the goods remaining unsold at the time the assignee came into possession should go to Quick, and that he should be allowed to prove against Brown's estate as an unsecured creditor for the goods sold by Brown and misappropriated, on surrendering the notes and mortgage.

See, further, that a clause in a chattel mortgage, allowing the mortgagor to retain possession and sell the goods for the mortgagees as their agent, and to account to them for the proceeds, is valid. *Hawkins vs. Hastings Bank*, 1 Dillon, 462.

But that in Illinois, a chattel mortgage authorizing the mortgagor to sell the property mortgaged, is void as against creditors. *In re Forbes*, Vol. 5 of this series, page 510; *Davis vs. Ranson*, 18 Illinois, 396; *Barnet vs. Fergus*, 51 do. 352.

See, also, *In re Stephens*, Vol. 8 this series, page 189; *Bowen vs. Clark*, 1 do. 128; *In re Morrill*, 8 Bankruptcy Register, 117. [*Reporter.*

In re THOMAS & SIVYER.

DISTRICT COURT—EASTERN DISTRICT OF WISCONSIN—JANUARY, 1878.

IN BANKRUPTCY.

1. NOTE—FIRM LIABILITY.—Though a note is signed by the members of a firm, with their individual names, yet, if the consideration when received is treated as copartnership funds, the note is a firm liability.

2. BANKRUPTCY—PROOF OF JOINT DEBT—INDIVIDUAL SECURITY.—In a proceeding in bankruptcy, a creditor of the firm, holding security upon the separate property of one of the partners, may prove his entire claim against the joint estate without releasing his security, though the member whose individual estate constitutes the security, owes no individual debts.

3. Discussion of cases.

In April, 1875, George L. Thomas and Byron G. Sivyer, the bankrupts, formed a copartnership for the purpose of carrying on a livery and boarding stable business, under the name and style of Thomas & Sivyer. The copartnership relation began about the 8th or 9th of April, 1875, although the active conduct of the business did not commence until some days later. Previously Sivyer and one White had, as copartners, carried on the same business, and by arrangement, the bankrupts purchased White's interest, agreeing to pay him therefor a certain sum of money in cash, and to assume and pay his share of the liabilities of the original firm. To enable them to carry out this arrangement, the bankrupts negotiated a loan of five thousand five hundred dollars from a corporation known as "The Trustees of Nashotah House." This loan was consummated on the 15th day of April, 1875, and on that day the bankrupts executed to Nashotah House,

their joint note for the sum borrowed, signing the note in their individual names. On the same day they received from the agent of Nashotah House a check for the money, running to them in their firm name, and at the same time the bankrupts, in their firm name, gave to White a check upon their bankers for one thousand nine hundred and sixty dollars, the amount agreed to be paid to him in cash upon their purchase of his interest. The remainder of the money so borrowed appears to have been treated and used by them as copartnership funds. The active prosecution of the copartnership business began on the day these transactions took place. Concurrently with the making of the loan of five thousand five hundred dollars, and as security for the repayment thereof, the bankrupts procured to be executed to Nashotah House a mortgage upon real estate, which mortgage was executed by Dorothy Sivyer, wife of Joseph Sivyer, deceased, E. H. Sivyer and wife, Annie J. Sivyer, Byron G. Sivyer, one of the bankrupts, and Julia N. Sivyer Thomas, wife of Geo. L. Thomas, the other of said bankrupts, and by said Thomas. The lands so mortgaged were the property of the heirs of Joseph Sivyer, deceased, each owning an undivided quarter interest, subject to a life interest held by the widow Dorothy Sivyer, the widow and heirs thus joining in the mortgage, and Byron G. Sivyer, one of the bankrupts, and Mrs. Thomas, wife of the other bankrupt, being two of the heirs. This mortgage has been ever since held by the Nashotah House.

Sivyer and Thomas carried on their copartnership business until October 8, 1877, when they filed a voluntary petition in bankruptcy, and were adjudicated bankrupts as copartners and as individuals. Their schedules disclosed partnership liabilities and assets, and also individual liabilities of Thomas, but did not show any individual liabilities of Sivyer. The interest of Sivyer in the real estate mortgaged to Nashotah

House was scheduled as individual assets. At a meeting of creditors for the choice of an assignee, the Nashotah House was permitted by the register to prove its claim as a demand against the partnership or joint estate of *Thomas & Sivyer*, without surrender of the mortgage security, and to participate as could an unsecured creditor of the firm, in the election of the assignee. Objection being made by other creditors to this ruling of the register, the case was certified for the opinion of the court.

Orton & Frankenburger and *D. S. Ordway*, in support of proof of debt.

Howard & Wall and *F. C. Winkler*, for opposing creditors.

DYER, J.—Two questions are presented: *First*, Is the debt owing to Nashotah House a partnership liability, for the payment of which, the creditors may look to the joint estate of the bankrupts? *Second*, If it is a partnership debt, can it be proved against the joint fund without surrender of the mortgage security? The first question must, in my opinion, be answered in the affirmative. It is true that the note held by the Nashotah House was signed by the bankrupts in their individual names. But this circumstance is not controlling upon the real character of the liability. "The form of negotiable paper is at most the slightest *prima facie* evidence of the true character and relations of the parties whose names appear upon it. The members of a firm may appear either upon the face or back of the paper, in their individual names or in the name of the firm. If the paper is made or signed in any manner in the course of the business of the firm, it is partnership paper."[1] The evidence

[1] *Richardson vs. Huggins*, 23 New Hampshire, 129.

shows that at the time of the five thousand five hundred dollar loan, the copartnership relation existed between Thomas and Sivyer. The money when received was regarded and treated as a copartnership fund. It was dealt with by the parties as a fund employed in their joint enterprise. In the proof of debt made by the Nashotah House, it is stated that it was represented by the parties, when they made the loan, that the money was to be expended in purchasing partnership stock, and other joint uses; that they desired and offered to sign the note in their firm name, but at the request of the creditor they subscribed it with their individual names. "A note signed by each of the members of a firm individually, the consideration of which went into their company business, and given instead of one signed with the partnership name, because the payee so preferred, held to be a partnership note."[1] The true test is, was this money borrowed by these parties as copartners, and for the benefit of the firm, and was it so used. Of course, this question is not to be decided upon statements contained in the proof of debt which is tendered; and looking into the evidence and into the circumstances of the transaction, I am satisfied that the demand in question is the firm debt of Thomas & Sivyer. Entries on their books have been pointed out as tending to a different conclusion, but I do not see that they bear as materially upon this question, as they may upon other questions touched upon in the argument, but not now directly presented for adjudication.

Mr. Parsons in his work on Partnership, page 215, says: "If a partnership be contemplated and agreed upon, and a purchase is made, or a debt otherwise incurred by one of the partners for the partnership, but before the actual formation of the partnership, it is only the debt of that partner." This

[1] *Kendrick vs. Tarbell, Jr.*, 27 Vermont, 512.

proposition was cited by counsel, in combating the claim that the demand held by the Nashotah House is a firm liability. But upon the facts of this case, that proposition is inapplicable, because it has reference only to the case of a debt incurred by one of the partners before the existence of the copartnership.

Conceding that the demand held by Nashotah House is the firm liability of Thomas & Sivyer, the more serious question remains, can the creditor be permitted to prove against the joint estate, without giving up its mortgage security to the extent that it covers the interest of Byron G. Sivyer, one of the bankrupts, in the lands mortgaged? The question is an interesting one, and was very forcibly discussed by counsel, both in oral argument and in written briefs since submitted.

Counsel for creditors who oppose the proof of debt, contend that the case is not like that of the creditor of a firm who holds as security the collateral liability of a third party, which he may hold and still prove his debt, as if unsecured, against the joint estate, but that here the security, to the extent of the bankrupt Sivyer's interest in the land mortgaged, belongs in fact to the estate against which the debt is proven; that the interest of Sivyer in the mortgaged land is part of the estate for the payment of the partnership debts, especially as his individual schedules do not show that he owes individual debts; hence, that the creditor cannot prove against the joint estate without surrendering his security. Counsel were also understood to deny the general proposition that a joint creditor having security upon the individual estate of one of the members of a firm, is entitled to prove against the joint estate without giving up his security.

The bankrupt law provides[1] that when a creditor has a

[1] § 5,075 Revised Statutes.

mortgage upon the property of the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property to be ascertained by agreement or sale; that the creditor may release his claim upon such property and be admitted to prove his whole debt; and if the property is not so sold or released, the creditor shall not be allowed to prove any part of his debt. It is to be observed that the security here spoken of is such as is upon the property of the bankrupt, and as it is the firm that is the bankrupt where the proceedings are against a copartnership, there is certainly some reason for construing this statute upon its bare language and independently of other considerations, as meaning that the creditor who must give up his security in order to prove his debt, must be one who has a lien upon the property of the firm; *i. e.*, the bankrupt. And this, too, notwithstanding the fact that, as an incident to the adjudication of the firm, the individual members are also adjudicated bankrupts.

Giving due consideration, as we should, to the object of this statute, it is plain that its purpose was to place the creditors of a bankrupt upon an equal footing in the proof of claims against the fund or estate chargeable in equity with the payment of such claims. So manifestly unjust would it be to unsecured creditors to allow a creditor holding a lien upon property, to which, in the absence of such lien, all creditors might, according to established principles of equity, equally resort, to prove his entire debt, and at the same time hold his security, that the law was so framed as to forbid it.

The distinction, however, between joint and individual estates is in no manner affected. That distinction is inherent, must be always maintained, and is fully recognized in its application to partnerships, by the bankrupt law itself.[1]

[1] § 5,121 Revised Statutes.

It is settled, that where the property of a third person is pledged to secure the bankrupt's debt, the creditor holding such security may, without relinquishing it, prove his whole debt. In such case the security does not diminish the estate to which creditors must look, and, moreover, the court would have no authority over property constituting the security and held by a stranger to the bankruptcy proceedings. The case, in event of such security, would not be within the statutory provision.

The question then recurs, in view of the statute, its terms and object, and the established, inherent distinction between joint and separate estates, may the creditor of a firm, holding security upon the separate property of one of the partners, prove against the joint estate without releasing his security? The strength of the argument against it in the case at bar seems to lie in the claim that the bankrupt, Sivyer, whose individual estate constitutes the security, owes no individual debts, and that, therefore, that estate is chargeable with the partnership debts equally with the joint estate—a claim which will be considered after first noticing such authorities as can be found bearing upon the general proposition.

The case of *Plummer*, 1 Phillips, 56, was referred to, on the argument. In that case the creditor of a firm took from the firm, security for the payment of certain indebtedness. He also received from the debtors joint and several covenants in writing to pay his demands. The question was whether he was entitled to prove his whole debt against their separate estates and hold his security upon their joint estate. The Lord Chancellor held that he could. Here was the case of a separate creditor having a security upon the joint estate, seeking to prove against the separate estate without surrendering his security. The Lord Chancellor, in his opinion, says that: "In administration under bankruptcy, the joint

estate and separate estate are considered as distinct estates; and accordingly it has been held that a joint creditor having a security upon the separate estate is entitled to prove against the joint estate without giving up his security, on the ground that it is a different estate." And he holds one case the converse of the other, and that the same principle applies to both.

In *Ex parte Peacock*, 2 Glyn & Jameson, 27, which was a case decided first by Sir J. LEACH, and afterwards by Lord ELDON, a joint creditor who held security from one of the joint debtors was allowed to prove his debt against the joint estate without a sale or surrender of his security, and this case is cited as authority in *In re Plummer*.

In *Ex parte Parr*, 18 Vesey, 65, the facts were that a house in Demerara drew upon another house in Liverpool, and the draft was accepted by the latter house. The Demerara house, at the time of drawing the draft, gave to the creditor other security. The house at Liverpool was partner with the Demerara firm. The acceptors became bankrupt, and it was held that the creditor could prove his debt against them, without deducting the value of his security, on the ground that, although the two houses were partners, the drawers and acceptors still constituted different firms.

In the case of *Howard, Cole & Co.*,[1] the court, in speaking of the 36th Section of the Bankrupt Act, and upon the distinction between joint and separate estates, makes this statement: "It has, therefore, been held that a joint creditor, having a security upon the separate estate, is entitled to prove against the joint estate without giving up his security." Counsel in argument claim that this language, in the opinion of the court, is altogether *obiter*, and perhaps it was an observation not essential to a decision of the question under

[1] 4 National Bankruptcy Register, 571.

consideration in that case. But it is stated as a proposition from which is deduced a principle influencing the conclusion of the court on the question before it, which was one relating to the proof of a claim against both joint and separate estates.

In *Ex parte Whiting, In re Dow et al.*, 14 National Bankruptcy Register, 307, Judge LOWELL observes that: "When one partner has pledged his shares for the debt of the firm, proof may be made in full against the assets of the firm, because it is only when the proof is against the same estate which furnished a security, that a sale and application of the security is required by the bankrupt law."

In the matter of *Holbrook & Co.*, 2 Lowell, 259, the bankrupts were the firm of F. F. Holbrook & Co., and the property assigned as security was owned by Holbrook alone. Judge LOWELL says: "The statute only requires the property to be renounced, sold or valued when it is the property of the bankrupt. If the goods or estate of any third person have been pledged for the bankrupt's debt, equity does not require that the general creditors of the bankrupt should have the advantage of this security; on the contrary, the equity is, that the estate of the volunteer should be exonerated, * * * whether the creditor had security by indorsements, or in any other way that has not diminished the general assets, he has a right to prove it. * * * This rule applies to partnerships when the estate of one partner has been pledged or mortgaged for a debt of the firm, and for the same reason, that the full proof should be made against that estate which is the principal debtor" (citing Story on Partnership, § 389; *Ex parte Parr*, 1 Rose, 76; *Ex parte Plummer*, 1 Phillips, 56; *Wilder vs. Keeler*, 3 Paige, 167; *Besley vs. Lawrence*, 11 do. 581; *Ex parte Peacock*, 2 Glyn & Jameson, 27.) In the case of *Wilder vs. Keeler, supra*, the Chancellor says: "A creditor of the joint

estate is always entitled to whatever he can obtain out of that fund in the hands of a surviving partner without relinquishing his security against the separate estate of the deceased partner."

These are the cases bearing upon this question which have come to the attention of the court, and it is claimed that so far as they touch the precise point under consideration they are little more than *dicta*. It is true that they do not discuss the question, but rather assume the proposition to be settled. Nevertheless, I think they are not to be disregarded as wanting in application to the present case or in authoritative character, as insisted by counsel.

Looking at the question in the light of principle, we encounter at once the distinction between joint and separate estates, which the law recognizes, and which, as has been remarked, is inherent. The primary fund for the payment of partnership debts is the joint estate. It is true, that after exhausting that estate, ultimate recourse may be had upon the separate estate for the payment of partnership debts if such separate estate is not absorbed by individual debts. But this possible result does not rub out the line of separation between joint and separate estates, which the law has established and which makes them, in fact, different estates.

It is contended that as the schedules of the bankrupt Sivyer do not show individual debts, his individual interest in the lands mortgaged must of necessity fall into the joint estate as part of the fund for the payment of joint liabilities. Undoubtedly, these schedules may be resorted to as evidence that Sivyer does not owe individual debts; but they are not to be regarded as conclusive evidence. And the question is, even if it be true that he has no individual liabilities, so that as an ultimate result, partnership creditors may, if need be, have recourse to his separate estate, can or ought that circumstance to affect the application of the rec-

ognized distinction between joint and separate estates? In other words, does the enforcement of that distinction depend only upon a state of case involving a marshaling of assets because of the existence of joint and individual liabilities, or is it a distinction which must have recognition *ex necessitate*, even though, ultimately, the joint creditor may have a right to pursue the separate estate? As I have said, the primary estate for the payment of the joint liabilities of Thomas & Sivyer is the partnership fund. That is the estate against which partnership debts are proven. Even in the absence of individual debts, each of the partners has an equitable right to insist that the primary fund be exhausted before coming upon their separate estates for the payment of firm debts. In view of the consideration thus suggested, I think it is not accurate to say that the interest of the bankrupt Sivyer in the land mortgaged, belongs to, or is part of, the estate against which partnership debts are proven, though it should be that ultimately partnership creditors might reach it.

The ground upon which the Lord Chancellor, in the case of *Plummer*, *supra*, rests the proposition that a joint creditor may prove against the joint estate without relinquishing his security upon the separate estates is, that the two estates are different. And *In re Holbrook & Co.*, *supra*, Judge LOWELL, speaking of partnership and partnership liabilities, refers to the joint estate as the principal debtor, and as, therefore, the estate against which the debt is proven.

Then, if the joint estate is the primary fund for the payment of the partnership debts, can it be said that any other than that estate is the one against which the claim in question is proved, and can it be said that this creditor has security upon that joint estate? I think not.

There is a class of cases in which it has been held that where a creditor holds notes signed by a firm, and signed or indorsed also by an individual member of the firm, he may

prove against both estates, and receive dividends from both.[1] These cases establish a rule opposed to the old rule on the subject in England, and the principle thus settled seems to reach out to the question involved in the case at bar. The scope of these decisions is, that when an individual member of a firm, as such, becomes surety upon or indorses an obligation of the firm, he thereby gives what is in the nature of security upon his separate estate to the firm creditor; and by reason of the individual liability, superadded to the joint obligation, he places the firm creditor in a position where he can go against the individual as well as the joint estate.

Thus it results, that without the indorsement or individual signature of one of the firm, the firm creditor would have no right to claim against the individual assets until individual creditors had been first satisfied. But holding the individual indorsement or signature, the firm creditor may, in the first instance, prove against the separate as well as the joint estate.

Now, such separate liability would seem to be, at least, in the nature of security, though differing radically, it is true, in character and form from that of a mortgage, and yet double proof by the firm creditor in such case may be made without any abatement of advantage which his diligence has secured. The principle which sanctions such a rule seems to lend support to the view taken of the question involved in the case at bar, and on the whole, my opinion is that the Nashotah House has a right, as a creditor of the firm of Thomas & Sivyer, to prove its debt against the joint estate without valuation or surrender of its security upon the separate property of Sivyer, and may, therefore, participate in the election of an assignee with other firm creditors.

[1] *In re Farnum*, 6 Law Reporter, 21; *Mead vs. National Bank*, 2 National Bankruptcy Register, 178; *Emery vs. Canal National Bank*, 7 do. 217.

SINGER MANUFACTURING COMPANY vs. NELS LARSEN.

CIRCUIT COURT — NORTHERN DISTRICT OF ILLINOIS — FEBRUARY, 1878.

IN EQUITY.

1. EXPIRED PATENTS—RIGHT TO USE OF NAME.—If a sewing machine has acquired a name which designates a mechanism or a peculiar construction, parts of which are protected by patents, other persons, after the expiration of the patents, have the right to construct the machine and call it by that name, because the name only expresses the kind and quality of the machine.

2. TRADE MARKS.—There can be no trade mark in the name "Singer Sewing Machine."

3. "SINGER SEWING MACHINE."—While any one, not connected with the Singer Manufacturing Company, has the right to construct a "Singer Sewing Machine;" yet he cannot be permitted to do any act, the necessary effect of which, will make people believe that the machine he constructs and sells, is manufactured by the Singer Manufacturing Company.

Wm. H. King, for complainant.

W. B. Scates, for defendant.

DRUMMOND, J.—Under the evidence in this case, I think there can be no doubt that the plaintiff cannot claim the exclusive right to manufacture the "Singer Sewing Machine." All that it can claim is to make a machine of its own peculiar manufacture, with a device in the nature of a trade-mark. Otherwise, after a patent has expired which has established the nomenclature of a sewing machine, as the Howe patent, or the Wilson patent, the patentee might go on and have the benefit of the patent indefinitely.

On a machine called "The Singer Sewing Machine," there were various patents. These patents have all expired, and nothing can, therefore, be claimed under them. Other persons cannot be prevented from manufacturing a machine like the Singer sewing machine, and which may be called, to distinguish it from other machines, "Singer's Sewing Machine." If a sewing machine has acquired a name which designates a mechanism or a peculiar construction, parts of which are protected by patents, other persons, after the expiration of the patents, have the right to construct the machine and call it by that name, because that only expresses the kind and quality of the machine. I have read the reports of the case of the *Singer Manufacturing Company vs. Wilson*, originally decided by the Master of the Rolls in England, and afterwards on appeal, in the Chancery Division of the High Court of Justice, and again, on appeal from the latter court to the House of Lords,[1] and I do not think it is necessary to controvert the general rule there laid down—that there must be something to indicate that the thing manufactured is not the same as that of the complainant; in other words, to show it is not manufactured by the plaintiff. That is, it is a question of manufacture, not of name. A person could not claim a right to construct a peculiar form of barrel as to dimensions and capacity merely, irrespective of any marks or brands impressed upon it. That of itself could not be a lawful trade-mark. The same rule would be applicable to the construction of a wagon or carriage, which, owing to some peculiarity, might possess a particular name as that of the original manufacturer. A man might construct a wagon or carriage precisely like it, and he would not be liable if he did not claim in some form that it was constructed by the

[1] Law Reports, Chancery Division, Vol. 2, 1876, 434; Law Journal Reports, 1878, N. S. 47 Chancery, 481.

manufacturer. The only principle upon which an action can be sustained under such circumstances, as I understand, is through a trade-mark. If there were a valid trade-mark called a "Singer Machine," then there would be some force in the plaintiff's claim. Here the plaintiff and the defendant have a trade-mark somewhat similar, and if there is on the machine manufactured by the plaintiff, a valid trade-mark to indicate that it is of the plaintiff's manufacture, no one else ought to be permitted to put anything on his machine to show that it has been manufactured by the plaintiff; that is, to use the same trade-mark. It may be the defendant has made his machine to imitate the plaintiff's, and to induce people to believe that it is the same. But as I have said, I do not think, under the circumstances of this case, there can be a trade-mark for the name, "Singer Sewing Machine."

An illustration is furnished in the opinion of the Lord Chancellor in the House of Lords in the case already referred to. A carriage called a "brougham" had been in very general use for many years. If that were devised by a man of the same name, so that, from its peculiarity of construction it was generally known by that name, it certainly cannot be claimed that the man who devised it, or his assignees, would have a sole right to construct a "brougham" for all time to come. If no patent existed upon it, or any of its parts, any one who has the requisite skill could construct just such a "brougham" as was originally constructed. There could, in such a case, be no trade-mark which the law would protect in the name "brougham;" and I therefore do not think that the opinion of the House of Lords can be construed to mean what is claimed by the counsel of the plaintiff in this case. So that, while I hold that the defendant is not prevented from constructing a "Singer Sewing Machine," still, he cannot be permitted to do any act the necessary effect of which will be to intimate, or to make any one believe that the ma-

chine which he constructs and sells, is manufactured by the plaintiff. Neither has he the right to use any device which may be properly considered a trade-mark, so as to induce the public to believe that his machine has been manufactured by the plaintiff; and, therefore, I shall modify the injunction in this case by simply requiring the defendant to refrain from selling any Singer sewing machines manufactured by any person or company other than the plaintiff, without indicating in some distinct manner that the said machines were not manufactured by the Singer Manufacturing Company.

WILSON PACKING COMPANY *et al.* vs. WILLIAM B. CLAPP.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—FEBRUARY, 1878.

IN EQUITY.

1. PATENT LAW—CANNED GOODS—NOVELTY—INJUNCTION—PROOF.—The main and principal feature of the art of canning foods of various kinds, being old and well known, a patent for any particular article of canned goods "as a new article of commerce" must be clearly sustained by proof, in order to sustain an injunction against other manufacturers of similar goods.

2. PLACE OF INFRINGEMENT OF PATENT—INJUNCTION.—An injunction ought not to issue to restrain the infringement of a patent when it does not appear from the record that the defendant has ever made or sold any of the goods in the district.

3. The sending of circulars to parties engaged in the trade, notifying them of a preliminary injunction, is improper.

4. Whether the pyramidal form of can, is patentable: *Quære.*

On the 5th of January last, a motion was made by complainants, based on the bill and affidavits previously filed, for an injunction, restraining the defendant from putting up, manufacturing, or selling canned corned beef, in such manner as to infringe upon certain patents belonging to complainants and particularly described in the bill. The bill and affidavits were not read, but both parties being represented by counsel, it was conceded that a case was made for an injunction and an injunction order was accordingly entered as prayed, with the understanding that defendant might move for the vacation of said order, as soon as counsel could prepare their affidavits. The affidavits were soon after filed and the motion submitted upon the allegations and proofs of the respective parties and the briefs and arguments of counsel.

Munday & Evarts, for complainants.

Eldridge & Tourtellotte, for defendant.

BLODGETT, J.—The bill charges that complainants own three patents relating to the subject matter of packing and preserving meats in hermetically sealed cans or packages. The first of said patents was issued in 1864 to W. C. Marshall. The second was issued in 1874 to W. J. Wilson, and the third was issued in 1875 to J. A. Wilson. All these patents have been *re-issued*, and two of them, (the Marshall and one of the Wilson) within the past year.

The claims are, briefly, for canned meats put up in the manner described "*as a new article of commerce*"; and for some special improvements in the cans or packages—the principal of which is the shape of the can—the Wilson can being made in the form of a section of a pyramid with rounded corners; whereby the solidly packed contents of the can are turned out in a firm mass or cake by cutting off the bottom or lower end of the can, so that the beef can be readily cut in slices for the table.

The process of preserving fruits, vegetables and meats in hermetically sealed cans or packages, is not new or original to these patentees. In 1810, M. Appert published in France the details of the process then lately discovered by him for preserving fruits, vegetables and meats by parboiling or cooking them so as to expel the fixed air, and then sealing them up in air-tight cans, bottles or jars. This discovery was considered of so much importance to the world that the French government paid M. Appert 10,000 francs for making it public. And the art has since then been extensively practiced both in this country and Europe. The Appert process was afterwards improved by Durand, Dankin, Gamble and others in England, and by Winslow and others in this country, so that canned foods of various kinds had become an article of commerce long before the date of either of complainants' patents.[1] The main and principal features of the art being so old, it will be, at least, a nice question to determine how far a patent for each particular article of canned foods "as a new article of commerce" can be sustained, as a new invention. I do not intend to be understood as now saying that such patents are invalid for want of novelty. I only intend to say that I think courts should not be hasty or inconsiderate in granting injunctions at the instance of the holders of such patents against other manufacturers of similar goods. And had the whole facts been brought to my notice, as they are now, at the time the original motion was made, I feel sure I should not have granted the injunction.

So far as the complainants' patents cover the cans they use, no special proof is put into the record. To the eye the cans used by complainants and those said to have been sold by

[1] 9 Encyclopedia Britanica, 767, title, "Food," published in 1855; 18 New American Cyclopedia (published in 1863), title, "Preservation of Food," page 569.

defendant, appear to be, externally, substantially alike. But I doubt whether the pyramidal shape which is the distinctive feature of complainants' can, is a patentable device. It would seem to be a shape so often adopted in other packages and molds when it is desirable to turn the contents out whole or solid, as to be no longer novel. Still, it may be patentable. I only intimate a doubt, and say that I think a court should be cautious in regard to such a patent.

Aside from the objections that apply directly to the patents it does not appear from the record that this defendant has ever made or sold any goods in the similitude of complainants' goods in this district. He is the agent of a St. Louis Packing Company for the sale of their goods in New York City, and does no business and has no place of business in this district. A preliminary injunction ought not, therefore, to issue against him in this district; because such a process cannot run beyond the territorial limits of the district; certainly not in an ordinary case such as is made in this record. A case possibly might be made upon extraordinary facts which would justify such an issue, but such case is not made here.

It also appears that immediately on the entry of the order in this case, circulars and notices were sent outside this district to parties engaged in the trade, dealing with the complainants' competitors, intended to alarm such persons and injure the trade of competing manufacturers. This strikes me as hardly justifiable under the circumstances. I think complainants, if they have faith in their patents, should make their attack directly on such competitors as they claim are infringing their patents, and contest the question squarely with them. This class of goods has now, according to the proofs, gone into very general use as an article of food, and can be found for sale in most family groceries; and it seems to me not the right course to attack these dealers, and annoy

and intimidate them by threats of patent suits. The course taken by complainants suggests the charge that they intended to obtain many of the advantages of an injunction by harrassing and interfering with the business of a rival without taking the risk of a direct suit with that rival, when they would be responsible for the consequences of their act. Such may not have been their purpose but it is liable to such construction.

The injunction is dissolved.

This case was subsequently brought to final hearing before Judges DRUMMOND and BLODGETT, and the patents held void for want of novelty, and the bill dismissed on a certificate of division. See *Wilson Packing Co. vs. Clapp, post*, page 545. [*Reporter.*

THE MERCHANTS NATIONAL BANK OF CHICAGO vs. SIMEON MEARS *et al.*

CIRCUIT COURT — NORTHERN DISTRICT OF ILLINOIS — FEBRUARY, 1878.

IN EQUITY.

NATIONAL BANK—REAL ESTATE SECURITIES.—A National Bank does not transcend its powers in taking from a customer as collateral security for a loan to him, the note and mortgage of a third party, together with certain personal securities; and if the borrower becomes insolvent, and the personal securities prove insufficient the bank can maintain a bill to foreclose the mortgage.

Bill of foreclosure.

Simeon Mears was a regular customer of the bank, fre-

quently borrowing large sums of money. Sometime prior to 1875, he borrowed $5,000 on short time paper, and deposited as security, note of J. E. Warren for $4,740, secured by mortgage to E. Ashley Mears, the note being payable to E. Ashley Mears, and indorsed over by him to Simeon Mears. When the latter's note matured he could not pay it, and the bank took Warren's note. When that matured Warren was insolvent, and Simeon Mears, who had indorsed it, was called upon to pay as indorser of Warren's note. The bank all the while held other securities, and by selling these, Mears' debt was reduced to $2,887, on September 3, 1875, when he gave a new note for this sum, and the Warren note was treated as collateral for this.

Mattocks & Mason, for complainant.

E. A. Otis, for defendants.

BLODGETT, J.—This case was submitted to the court on final hearing upon the briefs of counsel and upon the proof taken before the master. It is a bill filed to foreclose a mortgage given by J. Esaias Warren and wife to E. Ashley Mears, by E. Ashley Mears assigned to Simeon Mears, and by Simeon Mears assigned to the complainant. The defendants to the bill are Simeon Mears and the mortgagor, and George B. Warren, who claims as a grantee of the mortgagor by a quit-claim deed made some month or so after the mortgage was made, but recorded prior to the mortgage. The quit-claim from J. Esaias Warren, the mortgagor, to George B. Warren, was put on record about a month prior to the recording of the mortgage, although the mortgage was made prior to the quit-claim deed, but the testimony of George B. Warren shows very clearly that he took title from J. Esaias Warren, mortgagor, merely as security, with the

understanding that he took it subject to any liens which had been created upon the property.

There are two objections by these defendants to the foreclosure—first, on behalf of George B. Warren, that he is an innocent purchaser without notice, which I have said is sufficiently disposed of by his own testimony. The second is, that this transaction is *ultra vires*, that it is beyond the power of a National Bank to make a loan upon real estate security, and a large array of authorities is cited in support of this proposition, and it is a proposition in regard to which I have no doubt, where it is invoked in a proper case; but here, I do not think the loan can be said to have been made upon real estate security.

It was made upon a note to Mears, secured by collateral. The collateral was the Warren note—with such incidental security as the Warren note had.

I had occasion, about a year ago to go quite carefully into this question in a suit brought by the Northwestern National Bank against Loewenthal,[1] where precisely this same question was raised and contested very vigorously. All the authorities were there considered that entered into this brief; and I held then, and on re-examination of my position at that time, I am contented with the view I then took of the case—that the transaction cannot be held to be within the limitations, either expressed or implied, of the National Banking Law. The seventh clause of section 5,136 reads as follows: "To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and

[1] No written opinion, and not reported.

bullion; *by loaning money on personal security;* and by obtaining, issuing and circulating notes, according to the provisions of this Title."[1]

It is claimed, and I think it has been amply held by various State Courts, and indirectly by the United States Court, that National Banks can only loan money on personal security directly. Section 5,137, provides that: "A National Banking Association may purchase, hold and convey real estate for the following purposes, and no others: * * * Second, Such as shall be mortgaged to it in good faith by way of security for debts previously contracted."

Here is the express power to take a mortgage on real estate for debts which have been previously contracted. You may not loan money on real estate security; but after the creditor has made default, or after the loan has been actually made, the bank may take real estate security, unless the transaction should be colorable for the purpose of evading the statute—making the loan first, and taking security so soon afterwards as to show it was part of the original understanding; but in a case such as is provided here, there is no doubt but what the bank, after having made a loan, if it becomes doubtful of the borrower's solvency or ability to give satisfactory personal security, may then take a mortgage on real estate, so that this case now before me is not affected by the clause which I have just read. It simply authorizes them to take security on real estate under certain circumstances.

The seventh clause which was just read, undoubtedly contemplates that the loans made by a National Bank shall be made upon personal security. But was this anything but personal security? The bank had the note of Simeon Mears with a large amount of other collaterals, the whole transaction, in its inception, amounting to thirteen thousand dollars,

[1] United States Revised Statutes.

and from time to time, Mr. Mears made payments, and other securities were applied which were held by the bank, until the indebtedness from thirteen thousand dollars was reduced to twenty-seven hundred dollars, and then by an arrangement between the parties, this was taken as final satisfaction or security for the twenty-seven hundred dollars balance.

I think that this cannot be held within the inhibiting clause, and I am most clear that the defense set up cannot avail.

There will be a decree for the complainant for the amount found due, and it will be determined, of course, after the sale of the estate, whether there is any residue to go to the other parties in interest, after satisfying the lien of the bank.

UNITED STATES vs. SOUTH BRANCH DISTILLING COMPANY *et al.*

CIRCUIT COURT — NORTHERN DISTRICT OF ILLINOIS — FEBRUARY, 1878.

1. DISTILLER'S WAREHOUSE BOND.—The fact that distilled spirits are seized, condemned and sold for violation of the Internal Revenue Law, while bonded, does not release the obligors on the warehouse bond.
2. The fact that the purchaser at the sale paid the tax is immaterial.

Debt on bond, dated November, 1875, in penal sum of $7,000, given by South Branch Distilling Company, as principal, and H. J. Pahlman and Joseph Haas as sureties. Conditioned—

That if the said principal should well and truly pay, or

cause to be paid, to the Collector of Internal Revenue for the First District of Illinois the amount of taxes due and owing on a certain eighty-seven barrels of distilled spirits, particularly described in said bond, which were entered for deposit in the Distillery Warehouse, No. 1, of the said South Branch Distilling Company, in said district, during the month of October, 1875, before such spirits shall be removed from such warehouse, and within one year from the date of said bond, then said obligation should be void, otherwise to remain in full force.

Defendants, the South Branch Distilling Company and Joseph Haas, interpose as defense a special plea—

That after said bond was given, to-wit: on the 29th day of December, 1875, the United States, by its duly authorized Collector of Internal Revenue for said district, seized the spirits in said bond mentioned, as forfeited to the United States for alleged violation of Internal Revenue Law, heretofore committed by the said Distilling Company. That an information was duly filed on behalf of the United States in the United States District Court of this district, praying for a condemnation of said spirits; and that on the 5th of April, 1876, such proceedings were had on said information, that by the judgment and order of said court said distilled spirits were declared condemned and forfeited to the United States, and ordered to be sold; and that afterwards, and before this suit, in pursuance of said judgment, said spirits were duly sold by the marshal of said district, in the manner prescribed by law, to one Isaac Waixel, who duly paid to the Collector of Internal Revenue for said district the taxes due and owing on said spirits.

To this plea the plaintiff demurred generally.

Mark Bangs, U. S. District Attorney, for United States.

Stanford & Kohlsatt, for defendants.

BLODGETT, J. — It is claimed on the part of defendants that as this bond is conditioned for the payment of the tax on the spirits in question within one year, or when removed from the warehouse, and as the plea shows that the tax was paid by the purchaser at the condemnation sale under a seizure made by the Government, therefore, the condition has been substantially performed; that is, the Government has received the tax due on the spirits, while it is insisted on the part of the Government that this plea is no answer to the bond.

Section 3,271 Revised Statutes, requires "every distiller to provide, at his own expense, a warehouse, to be situated on and constitute a part of his distillery premises, and to be used only for the storage of distilled spirits of his own manufacture until the tax thereon shall have been paid."

Section 3,293 Revised Statutes, requires the distiller, on the first of each month, or within five days thereafter, to give bond conditioned for the payment of all taxes on all spirits deposited in said distillery warehouse during the preceding month; said bond to be signed by one or more sureties, and conditioned for the payment of the tax on such spirits before removal from such warehouse, and within one year from the date of such bond.

By Section 3,334 Revised Statutes, it is provided that: "All distilled spirits forfeited to the United States, sold by order of court, or under process of distraint, shall be sold subject to tax; and the purchaser shall immediately, and before he takes possession of said spirits, pay the tax thereon. And any distilled spirits heretofore condemned, and now in the possession of the United States, shall be sold as herein provided. If any tax-paid stamps are affixed to any cask or package so condemned, such stamps shall be obliterated and destroyed by the collector and marshal after forfeiture, and before such sale."

Now, does the fact that spirits are seized, condemned and

sold for violation of the Internal Revenue Law while so bonded release the obligors on the warehouse bond from their undertaking?

The contract is, in effect, that the distiller will pay the tax on the removal of the spirits from the warehouse, and within one year; and can the distiller and his sureties be heard to allege his own violations of the law as a reason for failing to keep their bond?

It seems to me the undertaking is absolute that the distiller will within one year from the date of the bond pay the tax; that the bond is taken for the express purpose of securing the payment of the "tax due and owing" on the spirits as a guaranty and security to the Government against any fraudulent or unlawful acts of the distiller. The bond is, so to speak, for the distiller's good behavior—at least in respect to the spirits so bonded. And it is no answer to the bond to say that by reason of the misconduct of the principal, the spirits have been forfeited and sold subject to tax, and that another person has paid the tax. The condition of the bond is, that the distiller, his heirs, executors or administrators shall pay the tax, and if he or they fail to pay, the condition is broken.

Section 3,334 requires all forfeited and condemned spirits to be sold subject to tax; and when the taxes have actually been paid, the collector is required to destroy the stamps on the packages. The manifest intention of Congress was, that all forfeited spirits should be sold subject to tax, and that the purchaser should pay the tax before he was allowed to remove them. And if such is the rule in regard to tax-paid spirits, it would seem to me to apply with equal force to bonded spirits.

As soon as distilled spirits are produced, the tax is payable, and the distiller may properly be said to owe the Government the tax imposed by the law. The warehouse

bond only gives him time on his liability, but does not in any degree release him from it.

No authorities bearing directly upon the question raised by these pleadings have been cited, and I am compelled to give my own construction to the contract and the law governing it. I may be wrong, but if I am the amount involved is sufficient to test the question in the Supreme Court.

Demurrer sustained.

UNITED STATES vs. EDWARD F. CULLERTON *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—FEBRUARY, 1878.

1. INTERNAL REVENUE—SENTENCE AS A BAR.—Where a distiller is indicted for violation of the Internal Revenue Laws, his conviction and sentence for such violations is not a bar to such action, unless the sentence is actually fulfilled—if a fine by payment, and if imprisonment, by serving out the term.

2. A PARDON is an effectual satisfaction of such sentence, and also operates as a complete release of the sureties on the bond from all liability for the same acts or breaches of duty charged in the indictment.

This is an action of debt upon a bond given by the defendants, conditioned for the faithful performance by defendant Cullerton of his duties in the office of Internal Revenue Gauger for the First Collection District of this state, to which he had been duly appointed. The bond bears date the 23d day of December, 1874.

Ten breaches of this bond are assigned in the declaration. To this the defendants plead two special pleas:

First—That on the 11th of February, 1876, Cullerton was

indicted by the Grand Jury of the District Court of this district for the same identical acts of misconduct assigned in said declaration as breaches of said bond. That he was afterwards duly arraigned in said court and pleaded "not guilty" to said indictment, and afterwards, to-wit: on the 12th day of June, 1876, he was duly tried on said indictment before said court and a jury, and by the verdict of said jury found guilty on the fourth count of said indictment and "not guilty" as to all the other counts and charges therein. On which verdict said court, afterwards, to-wit: on the 21st day of July, 1876, gave judgment and sentenced said Cullerton to pay a fine of one thousand dollars, and to be imprisoned in the jail of Cook County, Illinois, for the term of six months, and to pay the costs of said prosecution—which said judgment has not been reversed, etc.

Second—That after the trial, conviction, and sentence of said Cullerton as set forth in the first special plea, to-wit: on the 3d day of August, 1876, the President of the United States wholly pardoned and released said Cullerton from the offenses, causes of action and penalties alleged in the said several breaches in said declaration on condition that said Cullerton would pay the said fine of one thousand dollars and the costs of said prosecution. And avers that said Cullerton duly accepted said pardon, and paid said fine and costs long before the commencement of this suit.

To these two pleas the District Attorney filed a general demurrer.

Mark Bangs, U. S. District Attorney, for the United States.

C. H. Reed, for defendants.

BLODGETT, J.—The only question is, whether these two pleas present an answer to the action.

The first plea of indictment, trial, conviction and sentence

for the same offenses under the criminal clauses of the statute prescribing the duties and punishments of officers of the Internal Revenue Department, raises the question whether the Government can have a remedy upon the officer's bond after prosecuting and convicting him criminally.

I take it that there can be no doubt but that an acquittal under a criminal proceeding would be a bar to an action on the bond for damages for the same breaches of duty charged in the indictment. So that it is only necessary to ask whether the conviction for neglect of duty under the fourth count of the indictment is a bar to this suit for damages on the bond for the same negligence—the plea containing apt averments that the breaches for negligence assigned in this suit are the same as charged in the fourth count of the indictment.

A reference to the indictment pleaded in this case shows that it was based upon Section 3,169 of the Revised Statutes, and the acts of misconduct alleged in the declaration are substantially the same for which penalties are provided in this section.

The section reads as follows:

"Every officer or agent appointed and acting under the authority of any revenue law of the United States—

"*First*—Who is guilty of any extortion or willful oppression under color of law; or, *Second*—Who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty; or, *Third*—Who willfully neglects to perform any of the duties enjoined on him by law; or, *Fourth*—Who conspires or colludes with any other person to defraud the United States; or, *Fifth*—Who makes opportunity for any person to defraud the United States; or, *Sixth*—Who does or omits to do any act with intent to enable any other person to defraud the United States; or

Seventh—Who negligently or designedly permits any violation of the law by any other person; or, *Eighth*—Who makes or signs any false entry in any book, or makes or signs any false certificate or return, in any case where he is by law or regulation required to make any entry, certificate or return; or, *Ninth*—Who, having knowledge or information of the violation of any revenue law by any person, or of fraud committed by any person against the United States, under any revenue law, fails to report, in writing, such knowledge or information to his next superior officer and to the Commissioner of Internal Revenue; or, *Tenth*—Who demands or accepts, or attempts to collect, directly or indirectly, as payment or gift, or otherwise, any sum of money or other thing of value for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law, except as expressly authorized by law so to do, shall be dismissed from office, and shall be held to be guilty of a misdemeanor, and shall be fined not less than one thousand dollars, nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years. The court shall also render judgment against the said officer or agent for the amount of damages sustained in favor of the party injured, to be collected by execution. One-half of the fine so imposed shall be for the use of the United States, and the other half for the use of the informer, who shall be ascertained by the judgment of the court."

It will be seen that under this law the court is required *to render judgment against the officer or agent for the amount of damages sustained in favor of the party injured, to be collected by execution.*

Every gauger is required by law, Section 3,156, to give bond in a penal sum not less than five thousand dollars, conditioned for the faithful performance of his duties under the

law and regulations. And I am of opinion that it is not a good plea to a suit on this bond to allege an indictment, conviction and sentence under Section 8,169, or any other section prescribing penalties for violation of duty as such officer, unless there is an averment of satisfaction of the judgment. If a fine, by payment—if imprisonment, by serving out the term of sentence.

If the Government elects in case of breach of duty to prosecute its dishonest officer by indictment instead of proceeding on the bond for damages, and obtains a conviction and satisfaction of the judgment, I think it would be barred from proceeding on the bond for the same delinquencies; but until the judgment in the criminal proceeding is satisfied, I think the intent of the law would be to reserve to the Government the right of action on the bond for the damages.

It may be true, as contended in the argument, that where a statute provides a remedy by indictment and also by a civil action in behalf of the Government against an officer for violation or neglect of duty, and the Government proceeds by indictment, that this is a bar to the civil suit. But this statute is peculiar and I think it was the evident intention of Congress that an officer violating its provisions should be liable criminally and civilly, or at least, that his civil liability should not be discharged until he had *satisfied* whatever judgment might be rendered against him in a criminal proceeding.

I am, therefore, of opinion that the demurrer to the first special plea is well taken.

The second plea alleges an executive pardon after conviction on the fourth count of the indictment, and the plea avers the conviction and judgment to have been for the same identical acts of misconduct charged as breaches of the bond.

"A pardon in a legal sense is a remission of guilt." 1 Bishop on Criminal Law, 898.

Lord COKE says: "A pardon is a work of mercy, whereby the king either before attainder, sentence or conviction, or after, forgiveth any crime, offense, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical." 3 Institute, 233.

"A pardon is an act of grace proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for the crime he has committed." Per MARSHALL, Chief Justice. *United States vs. Wilson*, 7 Peters, 160.

"The effect of a full pardon is to absolve the party from all the legal consequences of his crime, and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty, or whatever else the law has provided." 1 Bishop on Criminal Law, 916.

In *Ex parte Garland*,[1] the Supreme Court of the United States says: "A pardon extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency, or after conviction and judgment."

"A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment, and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching. If granted after conviction, it removes the penalties and disabilities, and restores him to his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."

[1] 4 Wallace, 380.

So, BLACKSTONE says: "The effect of a pardon is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to the offense for which he obtains his pardon, and not so much to restore his former as to give him a new credit and capacity."[1]

One of the "legal consequences" of the violations of duty charged in this declaration is the liability to an action on this officer's bond, which he had given for the faithful performance of his duty; and I apprehend there is hardly room for a doubt that a full pardon—and the pardon here pleaded, when accepted and its conditions complied with, is a full pardon—releases its recipient from all the penalties attached to his offense. He is legally excused, and the offense wiped out against him.

It can hardly require argument to prove that if the executive has by the pardon pleaded remitted the legal consequence of Cullerton's official derelictions, no suit can be maintained against him or his sureties for those derelictions. All the remedies of the Government against him, both on his bond and by indictment, are released, and he stands purged of these offenses as fully as if the offenses had not been committed.

The law goes so far as to hold that the right of a private person to a share of a penalty by reason of his being an informer, or having instituted a prosecution under a penal law, is released by a pardon unless actually vested by judgment.[2]

The case of *United States vs. McKee*,[3] lately tried in St. Louis before the United States Circuit Court for the Eastern

[1] 4 Blackstone, 402.

[2] *Holliday vs. People*, 5 Gilman, 214; *Cope vs. Commonwealth*, 4 Casey, 297; *Commonwealth vs. Denniston*, 9 Watts, 142.

[3] *United States vs. McKee*, 4 Dillon's Reports, 128.

District of Missouri, Mr. Justice MILLER presiding, was almost precisely parallel to this in its main facts, and there the pleas of former conviction and punishment and of pardon were held to be a complete answer to a suit for the same offenses.

In the case at bar the plea avers that the misconduct alleged in the declaration is the same as that for which the defendant Cullerton had been convicted, and for which he had been pardoned. The Government may, of course, take issue on this averment, and if the offenses for which this officer was pardoned are not the same as those alleged in the declaration, perhaps this suit may be maintained. It may be that when the Government has proceeded against an officer by indictment for misfeasance, malfeasance or nonfeasance in his official duty, the presumption would be that all his official derelictions up to the time of the finding of the indictment had been charged, and that it could not afterwards indict or sue for acts committed prior to the indictment when a judgment had been given adverse to the Government, or when it had obtained a conviction and satisfaction; but the question does not arise and need not be decided at this time.

The demurrer is sustained as to the first plea, and overruled as to the second

F. W. SCHULZE, Assignee, Etc. vs. FRANCIS BOLTING.

District Court—Western District of Wisconsin—February, 1878.

In Bankruptcy.

1. A Mortgage to Secure Future Advances, is good as against the assignee in bankruptcy for the amount of advances actually made thereon.
2. A Mistake in the Description of the premises in such mortgage may be corrected as against the assignee to the same extent as would have been allowed against the mortgagor.

T. L. Kennan, for plaintiff.

Cox & Rogers, for defendant.

Bunn, J.—On the 24th of November, 1876, Henry Bolting filed his petition to be declared a bankrupt, and on the same day was declared a bankrupt by this court, and the plaintiff, F. W. Schulze, on the 5th of December thereafter was appointed assignee, and the estate of the bankrupt duly assigned to him. Afterwards, on the 15th day of February, 1877, Francis Bolting, the defendant in this suit, commenced an action in the State Court, to correct a mistake in the description of premises contained in a mortgage upon real estate in Portage City, Wisconsin, executed by Henry Bolting and wife, to him, September 27, 1875, for the sum of $4,000.

This action is brought to set aside that mortgage on the ground that it was obtained and given to hinder and delay creditors, and was without consideration. The evidence fails entirely to show any fraud or want of consideration in the

giving of the mortgage. On the contrary, it is proven that at the time the mortgage was given Henry Bolting was indebted to Francis in the sum of $779.14 for goods theretofore sold by Francis to him. The mortgage was given to secure the balance of indebtedness and also future advances of goods to be made by Francis to Henry. On September 30, three days after the mortgage was given, Francis Bolting sold and advanced to Henry on the strength of this mortgage goods to the amount of $959.81, making an indebtedness of $1,738.95, for which the mortgage is a valid security.

The mistake in the description of a portion of the property mortgaged is clearly proven, but it is insisted that this mistake cannot be corrected as against the assignee of Henry Bolting. This is a mistaken view. The assignee is not in the situation of a purchaser for value without notice. He simply succeeds to the rights of Henry Bolting and his creditors, and takes the actual interest which Henry Bolting and his creditors had in the property at the time of the filing of the petition, subject to all legal and equitable claims of other persons. He is in no better position than they would be to defend against an equity like this. And it is clear law that as against Henry Bolting, his heirs or personal representatives, and as against his creditors, even judgment creditors whose judgments are a lien on the land, such an equity must prevail. Such a special equity and charge upon the land will prevail as against the general lien of the judgment.[1]

As the mistake is set out in the answer and clearly proven,

[1] 1 Story's Equity Jurisprudence, § 165; *The Ontario Bank vs. Mumford*, 2 Barbour's Chancery, 596; *Cook vs. Tullis*, 9 National Bankruptcy Register, 433; 18 Wallace, 332; *Mitchell vs. Winslow*, 2 Story, 630; *Kelly vs. Scott*, 49 New York, 595; *Spackman vs. Ott*, 65 Pennsylvania State, 131; *Rhoades vs. Blackiston*, 106 Massachusetts, 334; *Winsor vs. Kendall*, 8 Story, 507; *Donaldson vs. Farwell*, 15 National Bankruptcy Register, 277; *In re Dow*, 6 do. 10; *Hayes vs. Dickinson*, 15 do. 350.

although no affirmative relief is sought by the defendant, I see no objection to his amending his answer or filing a cross bill praying for such relief, and taking a decree for the reformation of the mortgage. This course may save the expense of another action for that purpose. There must also be a decree for a perpetual injunction restraining the further prosecution of the action brought in the State Court. If such actions were allowed to be prosecuted in the State Court, it would lead to endless delay and complication in the settlement of the estate in this court. The defendant proved up his claim in this court in the bankruptcy proceedings, and all the difference between the situation of his case and the unsecured creditors is, that he will be entitled to preference of payment out of the funds realized from the sale of the mortgaged property. And if any action to foreclose the mortgage becomes necessary, that action should be prosecuted in this court by leave of the court first obtained, but probably no such action will be necessary.[1]

Decree to be entered in accordance with this opinion.

[1] *Phelps vs. Sellick*, 8 National Bankruptcy Register, 390; *Whitman vs. Butler*, *id.* 487; *Markson vs. Haney*, 12 do. 484; *Clifton vs. Foster*, 8 do. 656; 103 Massachusetts, 233.

B. D. BUFORD *et al.* vs. JOHN C. HENZIER *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—FEBRUARY, 1878.

IN EQUITY.

REDEMPTION—DRAFT ACCEPTED AS MONEY.—If the amount necessary to redeem from a sheriff's sale is paid to the proper officer in a bank draft, which is accepted by the officer but not actually collected until after the expiration of the time for redemption, the redemption is nevertheless complete. It is not essential that the payment be made in currency unless so required by the officer.

This was a suit to set aside and cancel a sheriff's deed, issued to the defendant, John C. Henzier, as the purchaser at a certain execution sale of real estate, on the ground that complainants were junior judgment creditors and had redeemed the property from the sale within one year, under the Indiana statute.

Claypool, Newcomb & Ketcham, G. F. Hunt and *Herod & Winter*, for complainants.

Baker, Hord & Hendricks, for defendants.

GRESHAM, J.—Jacob Gorman and B. D. Buford & Co. recovered judgments against Christopher Klippell in the Jackson Circuit Court of Indiana. To satisfy the Gorman judgment, which was senior, certain real estate, the property of Klippell, was sold on execution by the sheriff of Jackson County to John C. Henzier.

The statute of Indiana allows the judgment defendant and junior lienholders to redeem real estate from sales on execution by paying the purchaser or clerk of the court, for the

purchaser's use, the amount of the purchase money, with interest thereon at ten per cent. per annum, within one year from the day of sale.

Charles F. Hunt, agent of B. D. Buford & Co., bought from the Indiana Banking Company, of Indianapolis, a sight draft for $946 on the First National Bank of Cincinnati, payable to Hunt's order. With this draft, which amounted to a fraction more than the purchase money and accrued interest, Hunt proceeded to Brownstown, the county seat of Jackson County, where he indorsed and delivered the draft to the clerk on the day before the expiration of the period of redemption. The clerk received the draft as money, and receipted for it as such, in full redemption of the real estate from the sale. Both Hunt and the clerk acted in the utmost good faith.

Brownstown and Seymour are twelve miles apart on the Ohio and Mississippi Railroad, and there being no bank at Brownstown, the clerk kept an account with the bank at Seymour, where he sent the draft, after having kept it in his possession at Brownstown for thirty days. The merchants of Brownstown made their purchases mainly at Cincinnati. After the expiration of the period of redemption, Henzier demanded a deed on the ground that nothing but the payment of money was effectual to redeem from sheriff's sales. It is not insisted that the Indiana Banking Company did not have funds on deposit with the First National Bank of Cincinnati when it sold the draft to Hunt, nor that the latter bank was not then and thereafter able and willing to pay the draft in lawful money.

There being no bank at Brownstown, and the business men of that place being in commercial relations with Cincinnati, it was safer and more convenient for the clerk to hold exchange on Cincinnati than money or treasury notes.

I think it clear from the evidence that if the clerk had

preferred treasury notes, Hunt could and would have procured them without trouble or delay by selling the draft at Brownstown.

The draft represented $946, which Hunt had on deposit in the bank at Cincinnati, and the assignment and delivery of the draft to the clerk was a payment to him of that money. That is the usual mode of payment among business men. It was not necessary that Hunt should actually count down and pay over to the clerk the amount of money necessary to redeem from the sale. If there had been a bank in Brownstown, and Hunt having on deposit therein money enough to redeem from the sale, had given his check to the clerk for the required amount, and this had been done for the mutual convenience of Hunt and the clerk, Henzier's right to the real estate under the sheriff's sale would have been extinguished.

Between such a transaction and Hunt's indorsement and delivery of the draft to the clerk, I can see no difference in reason. The fact that the drawee of the draft was eighty-five miles distant when it was indorsed and delivered to the clerk would make no difference. The draft, in commercial circles at least, was the equivalent of money, and being more convenient, the clerk preferred it to money. The clerk was able and willing to pay to Henzier the amount of the draft in treasury notes if he had demanded them.[1]

Decree in accordance with the prayer of bill.

[1] *Jessup vs. Carey*, 61 Indiana, 584; *Webb vs. Watson*, 18 Iowa, 537; *Carter vs. Lewis*, 27 Michigan, 241.

THE ROBERTSON.

DISTRICT COURT—EASTERN DISTRICT OF WISCONSIN—MARCH, 1878.

IN ADMIRALTY.

LIEN—SUBROGATION.

1. This vessel, while in a foreign port, was seized for supplies furnished. The libellant in this case, at the request of the owner, signed the usual stipulation for the release of the vessel, and afterwards paid the amount which was decreed against the vessel: *Held*, that by signing such stipulation and paying such decree he did not become subrogated to the rights of the former libellant so as to acquire a lien upon the vessel, and that the libel could not be maintained.

2. A distinction exists between an actual advancement of money to clear off a lien, with a resulting hypothecation of the ship to the person making such advancement, and the act of joining with the principal debtor in an obligation to pay at a future time upon certain contingencies.

Libel by William Young against the steam barge Robertson to recover $368.13, which he had paid on a decree against him as surety on a bond given to release the barge from seizure under a former libel for supplies.

Van Dyke & Van Dyke, for libellant.

H. H. Markham, for respondents.

DYER, J.—On the 14th day of August, 1876, the steam barge Mary R. Robertson, a foreign craft, hailing from a Canadian port, and owned by Frederick A. Robertson, was at the port of Milwaukee, and was there seized under a monition issued out of this court upon a claim for supplies

furnished the vessel by Frederick G. McDowell and others. The owner interposed his claim of ownership in the action, and being a stranger at the port of Milwaukee, and without money or credit, applied to the present libellant to sign a stipulation for the release of the barge from the custody of the marshal, and thus enable her to proceed on her voyage. Upon repeated solicitations, and upon the understanding with the owner that he should have—and in the belief that by operation of law he would have—a lien upon the barge, the libellant, Young, executed the required stipulation, which was filed in the proceedings then pending, and the barge was enabled to proceed upon her then pending voyage. By virtue of the stipulation thus made, Young became liable to pay the claim of the original libellants if decree should be rendered in their favor. Subsequently such a decree was entered, execution was issued, and on the 19th day of September, 1876, Young was compelled to pay, and did pay, the amount of the decree, with interest and costs, amounting in all to $368.13. To induce the present libellant to sign the stipulation, in addition to the representation and understanding that libellant would have a lien on the vessel, the owner, Robertson, agreed, for purposes of further indemnity, to deposit $250 with William Young & Co. as soon as he could obtain it, and thereupon drew a draft for that amount upon himself, payable on demand at Goderich, Canada, which was dishonored and never paid. Young's dealings in the transaction were entirely with the owner of the vessel. The answer of the present claimants alleges that in March, 1877, the barge was sold at public auction at a Canadian port under and by virtue of a mortgage then existing upon the vessel, and they became the purchasers and paid full value without knowledge or notice of the present libellant's claim. These allegations of fact are not disputed.

The libellant files the present libel against the barge to

recover the amount paid by him upon the former decree in favor of McDowell and others, insisting that by virtue of the proceedings before recited he has a lien which may be enforced in admiralty. The claimants, on the other hand, insist that libellant's remedy is not *in rem* against the vessel, but is one that is only enforceable against Robertson, the former owner.

Various propositions stated by the learned counsel for the libellant in his argument are indisputable. There is no doubt that a maritime lien may arise or be implied for necessary advances made and necessary supplies furnished on the request of the owner of a vessel. This was held in the cases of *The Guy*, 9 Wallace, 758, and *The Kalorama* and *The Custer*, 10 Wallace, 204. In the two last mentioned cases the proposition is thus stated: "It is no objection to the assertion in the admiralty of a maritime lien against a vessel for necessary repairs and supplies to her in a foreign port, that the owner was there and gave directions in person for them, the same having been made expressly on the credit of the vessel."

It is also well settled that, "where proof is made of necessity for the repairs or supplies, or for funds raised to pay for them by the master, and of credit given to the ship, a presumption will arise, conclusive in the absence of evidence to the contrary, of necessity for credit."[1] Numerous cases cited in the brief of counsel also affirm the rule that a maritime lien may exist for moneys advanced to purchase or pay for necessaries supplied to a ship, in favor of the person making such advances, in cases where such lien existed or would arise for the necessaries themselves. As the rule is stated in *Thomas vs. Osborn*, 19 Howard, 28, "it is not material whether the hypothecation—express or implied—is made directly to the

[1] *The Grapeshot*, 9 Wallace, 129.

furnishers of repairs and supplies, or to one who lends money on the credit of the vessel, in a case of necessity, to pay such furnishers."

Invoking these general principles, counsel for libellant claim that the exigency in which the barge was placed by reason of her seizure under the libel in favor of McDowell, the vessel being in a foreign port and the owner being without money or credit, created a case of necessity, and that the transaction on the part of libellant as the signer of the stipulation which secured the release of the barge, was in effect an advance of money on the credit of the vessel for the payment of necessary supplies, and that within the principles before stated, a maritime lien was created which may now be enforced against the vessel; that the signing of the stipulation and the ultimate payment of the money was in effect one continuous transaction, and that the right to the lien accrued when the stipulation was signed, and the right to enforce it arose when the decree was paid by the stipulator; furthermore, that libellant became subrogated to the rights of McDowell, the original libellant and furnisher of supplies, and that upon the equitable principles of substitution, he may enforce against the vessel the same security and remedy as that held by the original creditor. I was impressed on the argument with the force of this view of the case. But in testing its soundness, serious difficulties arise. If by signing the stipulation and paying the amount of the McDowell decree, libellant was placed in the position of a party who, in a case of necessity and on the credit of the ship advances money for supplies or to pay the furnisher of supplies, thus enabling the vessel, then in a foreign port, to pursue her voyage, it would seem that he should have a lien. If he is in the position of a party who advances to the master or owner, money to pay the wages of a seaman, thereby becoming subrogated to the rights of the

seaman as against the vessel and acquiring as security for his advance the seaman's lien, then the question is free from difficulty. Counsel for the respondents admits that if the libellant, instead of signing the stipulation had at the time advanced the money to pay the McDowell claim, he would have been subrogated to McDowell's rights and have a lien.

The question which the case suggests, seems to center in the inquiry, when did libellant's lien, if any, accrue? When and by virtue of what acts did he become subrogated to the rights of the party holding the primary claim and lien? The vessel was under seizure. He executed a stipulation by operation of which the vessel was released. The stipulation or bond took the place of the vessel. The original libellant could no longer pursue the vessel. The liability of the stipulator became substituted for the original lien. The lien was then gone, the debt, however, remaining unpaid. Did Young *then* acquire a lien upon the vessel, or become subrogated to any rights of the then libellant McDowell? It seems quite plain that he did not, for the reason that he then parted with nothing. Up to that time he had made no advances for payment of the claim out of which the original maritime lien sprung. He had done that which in the law gave to the owner a release of his vessel, and by substitution of his voluntary individual liability debarred the original creditor from further asserting a lien upon the vessel. But at this stage of the procedure there could be no subrogation to the creditor's rights as against the vessel, because as yet there was no basis for application of the principle of subrogation. He was surely not in the position of a party who has made actual advances of money at the request of the master or owner to pay the furnisher of supplies. He had simply thus far involved himself in a personal contingent liability for the debt upon which suit was brought, and by force of law and the practice in admiralty the vessel was free.

A distinction is observable between an actual advancement of money to clear off a lien with a resulting hypothecation of the ship to the person making such advancement, and the act of joining with the principal debtor in an obligation to pay at a future time upon certain contingencies; and the mere execution by libellant of the bond for the release of the vessel, afforded no reason for applying the rule that he who at the request of the owner or master on the credit of the ship advances moneys to pay the furnisher of supplies, may have a lien, nor for application of the principle of subrogation.

If any rights at any time accrued to libellant against the vessel, it must have been when he paid the decree. But was that a payment for the benefit of the boat? Was it not rather a payment for the benefit of the owner, and nothing more? If at any time libellant could have been subrogated to any rights of the original creditor it must have been when he satisfied that creditor's claim by payment of the decree. But at that time what lien or security had McDowell upon the vessel? As before stated, when the stipulation was made and the vessel released, the lien was extinguished and gone. The creditor's security was the present libellant's bond and nothing more. The stipulation had, so far as McDowell was concerned, taken the place of the boat. This being so, to what rights or remedy of the creditor against the boat could Young be subrogated? The attitude of the case was then very different from what it would have been had libellant in the first instance, on request of the owner, advanced the money to pay the McDowell demand, for then clearly he would have been at once subrogated to all the rights of the creditor as against the boat. As surety upon the stipulation, libellant upon well settled principles of equity, might, on payment of the decree, avail himself of any security on the boat which the creditor had; but his own act of executing

the bond left no such security of which he could take advantage.

The case of *The Aurora*, 1 Wheaton, 105, was cited by counsel for libellant. The ruling in that case was that "a *bona fide* creditor, who advances his money to relieve a ship from an actual arrest on account of * * * debts, may stipulate for a bottomry interest, and the necessity of the occasion will justify the master in giving it, if he had no other sufficient funds, or credit to redeem the ship from such arrest." It will be seen that the case involved the question of a lien by bottomry.

In *The Hoyle*, 4 Bissell, 234, the boat was attached and held in custody for a debt. On application of the owner an advance of money was made by a third party to pay the debt and release the boat. It was held that the person making such advance had a lien which he could enforce *in rem*, in a court of admiralty. This was but an application of the doctrine of which I have spoken, that a person who lends money for the use of a ship in a foreign port has the same lien on the vessel as material men have. And if libellant in the case at bar, to relieve the barge Robertson from seizure, had then advanced the money to pay the McDowell claim, I do not doubt he would have had a lien, because the case would then have been within the principle which supports the ruling in the case of *The Hoyle*.

These cases and others, cited in the brief of counsel, among which is that of *The Ocean Wave*, 5 Bissell, 378, present facts so different from those we have here, that they cannot rule the case at bar. As libellant did not acquire a lien, by alone signing the stipulation which effected a release of the vessel, nor by alone paying the decree, I do not perceive how a lien can result from the acts taken together, if indeed they can be so considered. Nor can I attach much weight to the fact, that the owner of the barge

represented to and orally agreed with libellant that he should have a lien on signing the stipulation and thereby releasing the boat. If the law did not give to libellants a lien, if the transaction was not one out of which a maritime lien would spring, then any such agreement of the parties as is stated, would be ineffectual to create a lien, especially as against innocent subsequent purchasers for value.

This case, in its peculiar features, appeals strongly to the equitable favor of the court. But, as was observed by Sir Wm. Scott in the case of *The Mentor*, 1 Robinson's Reports, 151, while we may regret the loss to which the party has been subjected, and even seek for principles upon which the relief asked may be granted, it must be on legal grounds only that redress can be given. And if they are wanting, considerations of abstract equity cannot supply their place. Moreover, to sustain this libel would be to grant relief to one innocent man at the expense of others now owners of the vessel and equally innocent. When libellant incurred the obligation which ultimately he had to meet, he had it in his power to exact security that should amply protect him, and having omitted to do so, in the language of the court in a case cited on the argument, he can only be considered as now possessing the rights which arise against the person for whom he incurred the obligation, from having paid money for him which he had voluntarily and without consideration conditionally undertaken to pay.

Libel dismissed.

On appeal, this judgment was affirmed by Mr. Justice HARLAN. [*Reporter.*

In re CROFT BROTHERS.

DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS—MARCH, 1878.

IN BANKRUPTCY.

1. VOLUNTARY ASSIGNMENT AN ACT OF BANKRUPTCY.—The making of a voluntary general assignment by a debtor is an act of bankruptcy of itself and must be presumed to have been made in contemplation of bankruptcy.

2. INDIVIDUAL EXEMPTIONS FROM PARTNERSHIP ASSETS.—Partnership assets are a trust fund for the payment of the creditors of the firm, and no exemptions can be set apart from them to the individual partners, until all the partnership debts are paid.

3. ASSIGNMENT IN FRAUD OF CREDITORS—DISCHARGE IN BANKRUPTCY—Where prior to the filing of a voluntary petition in bankruptcy, the partners made a general assignment of all their assets, and the assignee set apart a portion of these as exemptions to one of the partners, it was *held*, that the assignment was made for the purpose of preventing some portion of the assets of the firm being distributed to satisfy firm debts, and: *Held*, *further*, that the court under such circumstances would not grant a discharge.

Becker & Dale, for objecting creditors.

BLODGETT, J.—This case was submitted to the court and tried upon evidence tending to sustain the following specifications:

First—That the bankrupts are voluntary bankrupts.

Second—That the bankrupts had within two months from the filing of their voluntary petition in bankruptcy, made a general assignment of all their assets to one Howe, in contemplation of bankruptcy, with intent to prevent their property from coming into the hands of their assignee, or being distributed under the bankrupt law.

The undisputed facts in this case are:

That about November, 1871, the bankrupts entered into partnership in the merchant tailoring business in this city; that they then had very little or no capital. Both were young men, and Frederick W. Croft only was married. In the spring of 1871, he had purchased a house and lot in the south part of the city for the sum of $3,228, $200 of which was paid down, and the balance to be paid by monthly payments of $32.28 each, which would make the payments run about seven years from the time the purchase was made. These monthly payments have been regularly made up to the first of last January, and mainly made by Mr. Croft, although his wife has kept boarders and earned money in that way, and earned some money by her needle, to the amount of five or six hundred dollars, which, if not directly applied to the making of these payments, yet aided in keeping them up.

During the same time, that is between the time the parties commenced business in the fall of 1871, and the time of their bankruptcy, Mr. Frederick W. Croft had furnished his house with furniture to the value of four or five hundred dollars. All the payments for the house, or to apply on the house, were taken out of the partnership business, as well as the money to buy the furniture, with the exception, perhaps, of what was earned by Mrs. Croft.

On the 12th of February, 1876, the bankrupts made a voluntary assignment to one W. E. Howe, of all their partnership and individual assets, "except what were exempt under the laws of the State of Illinois," in trust, to be converted into money, and the proceeds to be applied, first, to the payment of the expense of the assignment, and second, to be ratably distributed to the creditors of the bankrupts, or either of them. At the time of the assignment the firm owed about $4,200 to their commercial creditors. The nominal value of their assets turned over to the voluntary assignee, was a little over $3,000.

Immediately after the making of the assignment, Frederick W. Croft received from the assignee at least one hundred dollars' worth of cloth, and a sewing machine, together with the fixtures in the copartnership store, with the tools used in the business—the shears, cutting table, etc., as exemptions. These, he has testified, he gave to his wife, and with the property so withdrawn from the stock as exemptions, and the sum of $200 borrowed from a brother of the bankrupts, F. W. Croft resumed business in his wife's name and has carried it on up to this time. It does not appear that E. L. Croft received any exemptions from the firm assets, he being at that time an unmarried man.

On the 11th of April, 1876, this voluntary petition was filed. In the schedule of assets no mention is made of the cloth, fixtures, and tools withdrawn from the copartnership assets as exemptions to F. W. Croft, nor of the household furniture of F. W. Croft.

The question occurs then, was this assignment to Howe made in contemplation of bankruptcy?

It is admitted that the bankrupts were insolvent and knew themselves to be so at the time this assignment was made. Indeed, this admission is made upon the face of the assignment itself. And as early as the 20th of January preceding this assignment, the bankrupts had addressed a circular letter to each of their creditors informing them of the fact that they had taken an account of stock and liabilities, and found themselves unable to pay over forty cents on the dollar.

Frederick W. Croft, who has been sworn, testifies that he did not contemplate bankruptcy at this time; but he must be held to have known that the act of making this assignment was in itself an act of bankruptcy. The courts have so held, especially since the case of *The Globe Insurance Company*, decided by his honor, Judge Emmons, in the Northern District of Ohio, in 1875; 8 Chicago Legal News, 258. That

case has been so generally followed, and the courts have acted upon it so uniformly, that I think it may no longer be considered as an open question, that the making of a voluntary general assignment by a debtor is of itself an act of bankruptcy.

The firm was insolvent at that time, and, by the making of the assignment, they put it in the power of any of their creditors to put them into bankruptcy for this act. A man must be held to have contemplated the natural result and legal consequences of his act; he must be held to have known that his creditors could put him into bankruptcy for making this assignment, although he may not be presumed to know that they would so act.

So that I think from the admitted facts in the case, the assignment must be said to have been made in the contemplation of bankruptcy.

But to prevent a discharge, the assignment must have been made, not only in contemplation of bankruptcy, but it must be made with intent to prefer some creditor, or for the purpose of preventing the property from coming into the hands of his assignee in bankruptcy, or from being distributed in satisfaction of his debts. Does the proof show such intention?

It appears that immediately after the execution of the assignment, within a day or two, the voluntary assignee turned over to F. W. Croft, as a matter of course and without question, the fixtures in the store, the tools of the trade, including a sewing machine, and at least a hundred dollars' worth of cloth, from the partnership stock, with which F. W. Croft immediately resumed business in another locality. This conduct of the parties, simultaneously with the making of the assignment, is sufficient proof to me that such a course was intended at the time the assignment was made. In other words, it was expected that, as part of the trans-

action, this portion of the partnership assets was to be withdrawn from the hands of the assignee, and go into the control of F. W. Croft, and they were so withdrawn.

The amount so withdrawn was not large, but it was probably all that he could have taken under the bankrupt law, if the property had been his individual property. It must be borne in mind that this Frederick W. Croft had his homestead in the name of his wife; that it had been paid for out of the partnership earnings; he had his house furnished, which is proved to have been paid for out of the partnership earnings, and he then took from the partnership assets the amount he claimed as exemptions, and which was set apart and turned over to him by the voluntary assignee. But this court has uniformly held that exemptions cannot be taken from copartnership assets; that the partnership assets are a trust fund for the payment of the creditors of the firm, and that no exemptions can be set apart from them to the individual partners, until all the partnership debts are paid. This has been the rule of this court ever since I have been upon the bench, and I think ever since the bankrupt law was passed.

Upon the admitted facts, then, the conclusion is inevitable that this assignment was made with the intention and expectation that under its operation these exemptions, as they are called, would be withdrawn from the partnership funds, and applied to the benefit of one of the partners, and this intention was carried out.

I must, therefore, hold that this assignment was made in contemplation of bankruptcy, and for the purpose of preventing the property of the firm, or some part of it, from coming into the hands of the assignee in bankruptcy, to be distributed in satisfaction of the debts of the firm. If F. W. Croft had, on filing his petition in bankruptcy, returned these assets to the voluntary assignee, it might have pre-

vented the conclusion to which I have arrived—it might have rebutted the presumption that the intention of the voluntary assignment was to withdraw part of the partnership assets, and prevent them from being applied in satisfaction of the partnership debts.

I conclude, therefore, that this voluntary assignment, and the conduct of the parties under it, makes it incumbent on the court to withhold the discharge.

ABRAM B. BAYLISS *et al.* vs. LAFAYETTE, MUNCIE AND BLOOMINGTON RAILWAY CO. *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—MARCH, 1878.

IN EQUITY.

1. FRAUD OF DIRECTORS — RIGHT OF STOCKHOLDERS TO BE MADE PARTIES TO SUIT.—Where any fraud has been perpetrated by the directors of a company, by which the property or interest of the stockholders is affected, the stockholders have a right to come in as parties to a suit against the company and ask that their property shall be relieved from the effect of such fraud.

2. Whether they would have this right where it appears that there would be no surplus remaining after liquidating all the just claims against the property, *Quære?*

H. Crawford and *McDonald & Butler*, for complainants.

Templer & Gregory and *Harrison, Hines & Miller*, for defendants.

DRUMMOND, J.—This is an application made by certain

stockholders of the road to be let in as defendants in a bill filed to foreclose the mortgage on the eastern division of the road. The application is based upon alleged frauds perpetrated by certain directors of the road in connection with the contractors who built the eastern division. It seems that in consequence, as is alleged, of an understanding between Mr. Eells, the contractor, and certain parties, directors of the road, a proposition was made by him to construct the road, which was accepted by the company. He was to purchase and lay the iron and furnish the rolling stock, and construct depots, round houses, etc.

The company was to grade the road, build the bridges and culverts, and get the right of way, etc. It is claimed that in consequence of this arrangement the contract was made with Eells, and it is also apparent that the consideration to be given to Eells for the construction of the road — that is, all the part of it which he was to construct—was greatly in excess of the value of the work to be done by him. It is also alleged that the parties who were directors, and had made a contract for the construction of the road, were to participate in the profits—in other words, they, as directors, made a contract in which they had a pecuniary interest, and, as is alleged, in fraud of the company. There is, therefore, a sufficient allegation that the parties who made this contract were directors, that they had a pecuniary interest therein, that some of the contracts were secret, and that they were in fraud of the company and of the stockholders.

I think, therefore, on this ground, that there is ample reason given for the interference of the stockholders, and for the application which they make to become defendants, so that they may have the right to prove, if they can, the allegations they have set forth.

It is, besides, alleged that $1,600,000 of stock and $1,600,000 of the first mortgage bonds were given to Eells, and that

there was an arrangement made by which the bonds were to be sold at a certain price. It is also alleged that, in consequence of the agreement and understanding between Eells and those who were directors and parties to some of the contracts, when Eells proposed to the company that he should be released from his contract, they agreed to it, though he did not comply with his contract, and did release him from his contract, in fraud of the rights of the company. Taking all these various allegations together, I think the charge of fraud and conspiracy is sufficiently stated, or at least enough to show that, if true, a court of equity would not tolerate a contract such as is set forth in this case, made by the directors with themselves, in which they had a pecuniary interest. The court will make an order allowing these parties to come in and file an answer as defendants to the bill on the foreclosure of the mortgage upon their giving bond to secure the payment of the costs.

The only difficulty about the case consists in this: That whatever might be the result of the proposed litigation on the part of the stockholders who shall file an answer, and say that it is for the benefit of all the stockholders who will join them, that, in any event, whatever has been expended upon this road would have to be paid. This division of the road is about eighty-four miles long, and it may be questionable whether or not the amount that has been actually expended, and for which, of course, there would be a valid claim against the road on the part of the bondholders, if we consider the value of roads generally in this part of the state and the northwest, would not absorb it all, and whether, therefore, there would be anything left for these stockholders, and whether it is an application made to defend against a mortgage simply because in certain aspects of the case their pecuniary interests would be jeoparded.

This question was not argued before the court, and there is

nothing said in the proposed answer as to the value of the stock after all the just claims are paid. The answer admits that some of the bonds are valid and should be paid, and it admits further that there has been about eight or nine hundred thousand dollars expended upon the road. Now, whether or not there would be anything in any event coming to the stockholders is a matter of very grave doubt; and, I think, before this litigation proceeds further, that issue had, perhaps, better be distinctly made, so that the court shall be informed whether or not there would be a pecuniary interest for any of the stockholders remaining after liquidating all the just claims against the property. If there is not, it would give rise to this question: Whether a court of equity would allow the stockholders to come in and be made defendants for the purpose of making an example of these directors and teaching a wholesome moral lesson as to transactions of this kind. I do not say absolutely that it may not be the duty of a chancellor to allow it; that is, set aside all fraudulent acts of this kind, even though the stockholders may not have any residuary interest in the property after the payment of claims against it, but it is doubtful whether or not a court of equity ought to permit the great labor, expense and litigation which must follow, and which will have no pecuniary results in favor of the parties who are applying to the court, even if they succeed in all they have undertaken to do, namely: to prove the fraud against the directors of this company and the contractor. Therefore, I have thought that I would submit this question to the parties in this case and let them inform the court distinctly whether or not they desire to proceed in that view of the case, and wish to be made defendants and defend against the mortgage, involving, of course, as it would, all the costs, counsel fees, and labor which may be connected with such litigation.

I think the authorities are very clear that where any fraud

has been perpetrated by the directors, by which the property or interest of the stockholders is affected, the stockholders can come in as parties and ask that their property shall be relieved from the effect of such fraud; but in all cases which have been decided in the Supreme Court, and I think by other courts upon this subject, it is assumed that the stockholders will have an interest or property remaining after it is relieved from the effect of the fraud of the directors or the officers of the company.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK vs. SEXTUS N. WILCOX *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—APRIL, 1878.

1. AGENT'S BOND—EXECUTION IN BLANK.—The fact that a bond was executed in blank by the surety and afterwards filled up by his principal, does not alter the liability of the surety, where this irregularity is not brought home to the knowledge of the obligee.

2. EFFECT OF BLANK.—An agent's bond is not invalidated by being left blank in regard to the place of the agency.

3. LIABILITY OF SURETY.—If an agent gives a trust deed to secure payment of a defalcation, the cancellation of the deed upon subsequent payment in full of that defalcation, would not affect the agent's surety on a subsequent bond.

4. LIABILITY FOR PRIOR DEFALCATIONS.—If the agent at the time of the signing of the bond had moneys in his hands which he ought to have reported as collected but had not—they would come within the condition of the bond.

5. FRAUD—KNOWLEDGE.—In order for the surety to escape liability on the ground of existing irregularities and defalcations of the agent, it must be shown that these were known to the latter's principal.

M. W. Fuller and *F. H. Winston, Jr.*, for plaintiff.

George W. Smith and *E. A. Storrs*, for defendants.

BLODGETT, J.—This is a suit upon a bond given by Cronkhite as principal, and signed by the other defendant, Sextus N. Wilcox, as surety, conditioned for the faithful performance by Cronkhite of his duties as agent of the plaintiff and for the payment to the plaintiff of all moneys which might come into his hands as agent in the due course of his business, pursuant to the rules and regulations of the company.

The proof shows, and in fact it is admitted, that Cronkhite was a defaulter to the amount of something over fourteen thousand dollars on the 12th day of January, 1876, and suit is brought upon the bond to recover the amount of this defalcation.

The defenses set up are:

First—That the bond was executed in blank by the surety, Mr. Wilcox.

Second—That the bond as it now stands is in blank in regard to the location or place in which Cronkhite was agent.

Third—That Cronkhite had been for many years prior to the execution of this bond an agent for the plaintiff in this city, and was a defaulter to the company at the time the bond was executed, and that the company obtained the bond in question by fraudulently concealing from Wilcox the fact that Cronkhite was a defaulter at the time.

Fourth—That some seventy-eight hundred dollars of the alleged defalcation was incurred before the bond was given.

In reference to the defense that the bond was executed in blank and is not the deed of Wilcox, the evidence shows this state of facts: The company sent to Cronkhite a blank form of the bond used by them, the only written portion of the bond being the amount of penalty, $20,000, with directions

to Mr. Cronkhite to have it filled up, signed by his surety, and returned. Mr. Cronkhite took the bond to Mr. Wilcox, who signed it in the condition in which it came from the hands of the company; that is, without being filled up. Cronkhite then filled up the bond, and it was forwarded to the company. It was filled and returned to the company in precisely the condition in which it is now offered in evidence. There is no claim or pretense that it has been altered or changed since it came into the possession of the company. Cronkhite filled up the bond, putting in his own name, the name of the surety, and the date, perhaps, but left blank the name of the place where Cronkhite was agent.

I am satisfied that this does not vitiate the bond in any particular. The authorities upon that point, 16th Wallace, 1, and 21st Wallace, 273, go to show that unless this irregularity is brought home to the knowledge of the principal to whom the bond is payable, the company will not suffer from it. There is certainly no evidence that it was brought home to this company, that this bond was not precisely as it now is, when Mr. Wilcox wrote his name for the purpose of giving this bond and having it properly placed in the hands of the company. Cronkhite was not the agent of the company in this transaction, but was acting in his own behalf, and if Mr. Wilcox saw fit to deliver a bond signed in blank to Mr. Cronkhite, he must suffer if there has been any irregularity.

It is further claimed that this bond was obtained by fraudulent concealment of the condition of Cronkhite's account, and that the company surrendered certain securities which they had, and of which the sureties should have had the benefit; whereby the contract is vitiated.

The facts bearing upon this branch of the defense, are simply these: Cronkhite, as has been stated, had been for several years the agent of the plaintiff in this city. In 1873, he was found to be behind in his accounts, and mak-

ing explanations that his deficiency had grown out of his giving indulgences to parties here in Chicago, who had suffered by the fire and various other reasons, he was continued in his office and an arrangement made that he should pay up from month to month this defalcation; and between the time that this defalcation was discovered, which I think was in September, 1873, and the time this bond was given in 1874, the deficiency was all paid up. About the time that Cronkhite had made or was making the last payment, at the time he remitted the drafts which as he supposed liquidated his former defalcation, he stated to the company that Mr. Warner, who had been his surety upon his bond as agent for the company here, had made an arrangement with his co-partners by which they had mutually agreed not to make indorsements, or become surety for any person, and asked that Mr. Warner's bond be cancelled. He said that a wealthy man—without naming him, of this city who would be entirely satisfactory to the company, was willing to become surety for him, and by the return mail, or shortly afterwards in acknowledging the receipt of the remittances, the company sent this blank bond and stated that when a new bond satisfactory to the company was returned, the Warner bond would be surrendered.

In accordance with this arrangement the bond in question was executed and forwarded to the company and the Warner bond surrendered. At the time the defalcation of 1873 was discovered, Cronkhite, in order to secure it, in addition to his bond signed by Mr. Warner, gave a trust deed upon certain property here in Chicago, for the nominal sum of $20,000, but for the real purpose of securing this defalcation, and at the time, or shortly after the Warner bond was surrendered, a small balance of some six hundred dollars for interest upon this defalcation, having been paid, Mr. Cronkhite wrote to the company that he wished this old trust deed

surrendered to him, and it was accordingly cancelled and returned.

It is alleged that this was in bad faith to Mr. Wilcox. But the evidence is conclusive to my mind that this old trust deed had reference only to the old defalcation; that whenever that defalcation was paid up, Cronkhite could enforce the cancellation of that deed; that there was no understanding or agreement that it was to stand as security for the future transactions or dealings between Cronkhite and the company, but only for this single defalcation; and in accordance with that understanding on the final adjustment of that defalcation, this security was cancelled.

Now with reference to the concealment of the condition of Cronkhite's affairs, there is no evidence that any inquiry in the first place was made by Mr. Wilcox or anybody else, as to the condition of Cronkhite's accounts. There is no evidence that any statement was made to Wilcox by any person connected with the company, except Mr. Cronkhite, and he, of course, was an interested party and making his own explanations, and the company was not bound by them, as it was simply a business relation between Cronkhite and Wilcox.

There is some evidence in the case that at the time this bond was executed, Cronkhite was in default to the company, but the defalcation was concealed, and concealed in this way: the chief business of Cronkhite consisted in the placing of policies of insurance or the obtaining of new risks and in the collections of the annual or semi-annual payments upon past policies. The renewal receipts were forwarded to Cronkhite from New York and it was his duty to collect the premiums and return them during the month or return in time so that he could get them in the succeeding month's business. It was his duty to forward them or return the money in his report of that month's business, but instead of doing so, he

got into the habit of returning a certain portion of his receipts as not paid, and carrying them over into the next month, and collecting the money the next month, and applying it upon them, and reporting them as paid and so lapping over the business of one month into the next.

There is no evidence whatever, that the company at this time had any knowledge of this course of dealing on the part of Cronkhite. They supposed him to be conducting his business entirely in accordance with the rules of the company and in a correct manner, but it is now attempted to defeat the claim of the plaintiff on the ground that this irregularity had been going on with the knowledge of the officers of the company for some time before this bond was given. I am satisfied that this irregularity on the part of Cronkhite was not known to the officers or general agents of the company, and that it supposed that Cronkhite's accounts were square. At the time this bond was given it was given in substitution of another bond which had been standing for several years, and I have no doubt that the understanding of all the parties was that the new surety stepped into the place of the old one, but if it were not so, I should consider that by the terms of this bond if there were any moneys in the hands of Cronkhite at this time, which he had not paid over and not reported as collected, they come within the spirit, intention and letter of the bond. That is to say, suppose that this bond was given on the first day of April, and that Cronkhite had money remaining in his hands which he ought to have remitted as part of his March collections, but had not remitted, I have no doubt that such money would come within the obligation of this bond. This consideration disposes substantially of all the objections to the claim of the plaintiff upon this bond.

The finding will be, the issues for the plaintiff—debt,

$20,000; damages, the amount of $14,982, and six per cent. interest, being in all, to date, $17,041.82.

A surety cannot escape liability on a bond as having been signed only on condition that a specified co-surety should be procured before it was used if he delivered it to the principal to be completed, with nothing on its face to suggest that such a condition was imposed. *Brown vs. Probate Judge*, 42 Michigan, 501. [*Reporter.*

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK vs. SEXTUS N. WILCOX.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—APRIL, 1878.

ULTRA VIRES—DEFENSE TO NOTE—LOANS.

1. Where the charter of a company provides that its surplus funds shall be invested in mortgages on real estate in New York, or in certain classes of bonds, it is not competent for one who in another state has obtained a loan on personal security, nor his surety, to set up in defense the want of power in the company to make the loan.

2. CREDIT FOR COMMISSIONS, claimed by an insurance agent from the company cannot be allowed a guarantor of the agent's note in a suit at law; such claim could only be made available in a suit in equity on an accounting.

M. W. Fuller and *F. H. Winston, Jr.*, for plaintiff.

Geo. W. Smith and *E. A. Storrs*, for defendant.

BLODGETT, J.—This is a suit upon a promissory note executed by Orville Cronkhite, payable to Merrill & Ferguson,

and guaranteed by Wilcox. The note bears date June 29, 1875, for the sum of $10,000.

The facts surrounding the transaction are these:

The Mutual Life Insurance Company is a corporation created in the State of New York, and deriving its powers from the charter granted by the State of New York, and certain of the general laws of that state.

The provisions of its charter applicable to this case are sections "9," "10," and "11."

"§ 9. It shall be lawful for the said corporation to invest the said premiums in the securities designated in the two following sections: * * *

"§ 10. The whole of the premiums received for insurance by said corporation * * * shall be invested in bonds and mortgages on unincumbered real estate within the State of New York; the real property to secure such investment of capital shall, in every case, be worth twice the amount loaned thereon.

"§ 11. The trustees shall have power to invest a certain portion of the premiums received, not to exceed one-half thereof, in public stocks of the United States, or of this state, or of any incorporated city in this state."

Mr. Cronkhite was the agent of the plaintiff in this city. In the month of June, 1875, he applied to the plaintiff for a loan of money, stating to them that his interests required that he should raise the sum of $10,000; that it was very difficult for him to attend to other business here as their agent, and at the same time make necessary changes in his own affairs. Considerable discussion and correspondence took place between the parties in regard to this matter, and finally the company concluded to let him have the money, and directed Merrill & Ferguson, who were the general agents of the company in the northwest, to advance the money, and the note was taken by Merrill & Ferguson and assigned by them

to the company. This note was guaranteed by Mr. Wilcox in due form; and at the same time, and simultaneously with giving the notes, Cronkhite gave to the company an assignment of all his interests in the renewals, as they are called. It was claimed, on the part of the defendant, that Cronkhite, as the agent of the company, had a vested right in the commissions upon the premiums which should be paid upon certain policies which he had placed as the agent of the company.

Shortly after this note was given, or perhaps simultaneously with giving it, the money was remitted to Mr. Cronkhite by Merrill & Ferguson; but Cronkhite continued to collect these premiums and receive them; did not remit to the company, but retained in his own hands all the premiums to which he was entitled as agent of the company from that time on until January, when it was discovered that he was a defaulter for a large amount of premiums collected and not paid over.

It is claimed: *First*, That this note is *ultra vires;* that this company had no right to loan this money to Cronkhite on the security of this note; and *Second*, That the company has been reimbursed by the collection of the premiums upon policies which Cronkhite had placed, and upon which he was entitled to commissions.

With reference to the *first* question—that of the power of the company—there is a class of old cases in the State of New York, which, perhaps, go to the extreme extent of holding that this company, being by its charter directed to invest its funds in a certain manner, all other methods of investing its funds are excluded, and even securities given for such investments are void. But there is no case parallel with this cited by counsel, and I have found none. The later New York cases, and the later cases all through the United States, do not go to the extent of the New York cases cited

by the defendant, and I think the settled rule now is, that the question of how this company shall invest its funds, is a question between itself and the sovereignty that created it, and not a question between the borrowers and the company; in other words, that it does not lie in the mouth of this defendant to charge that this security is void.

The money was advanced upon the faith of this security. But whether the company had the power to take this security or not, is a question the defendant has no right to raise.

There is a large number of cases that have arisen lately under the United States National Bank Act that are very analogous to this; where the bank is positively prohibited by the act from loaning more than ten per cent. of its capital to any one person, and yet the courts have held that securities given on such loans, in excess of ten per cent. were valid, and that it does not lie in the mouth of the party who borrowed the money of the company to object to a violation of this rule. Any other rule than this would make the policy holders and parties interested in the funds of this company entirely remediless. Suppose that the directors of this corporation, induced by the larger rate of interest which is usually proffered in the western states, or outside of New York, had, instead of loaning their money upon New York State security, seen fit to invest largely in securities in the State of Illinois, would the stockholders have to lose it all, simply because their directors had violated the charter? It would seem to me a very harsh rule to say that the parties interested in this fund should be the losers simply from this violation of the company's charter; a question simply between the sovereignty and the corporation itself.

Some force may also be given to the suggestion that this was an isolated transaction made between the company and its agent, and not a general change in the policy or business of the company.

But the same section which I have just read, for instance, requires that the funds of the company shall be invested on unincumbered real estate. Suppose that the directors had made loans to a man in the State of New York upon incumbered real estate, would it lie in his mouth to say that that loan was void because there was a mortgage on the property prior to the mortgage of the company for the debt.

The same section also provides that the real estate shall be at least double the value of the amount loaned.

Now, the same rule that is invoked here on the part of the defense would entitle a man in the State of New York, who has borrowed this fund, to say that the security for the loan was void because the property was not of double the value; that the directors had exceeded their power, and the note or obligation was *ultra vires*. I therefore conclude that the defense of want of power to make this loan here, and consequent invalidity of the note, is not well taken.

The next objection is, that the company has been paid by the collections of commissions which ought to have gone to Cronkhite, and which should be applied in liquidation of this note.

As I have already said, in stating the facts, Cronkhite, during the time he remained the company's agent, after the giving of this note, retained all the commissions in his hands, and the company received no commissions from him while he remained the company's agent. It may be a very important question whether Mr. Cronkhite is entitled to draw any commissions after his agency ceased.

On general principles, I would be inclined to hold that the insurance company would certainly have made a very improvident and unbusiness like contract to agree to pay an agent commissions on collections after he had ceased to be worthy of their confidence as an agent to make collections.

But whether that is so or not, I am satisfied that this de-

fense, if available at all, can only be made in a court of equity where an account can be stated, and it can be ascertained how much this company has collected that ought to be applied upon this claim.

I do not intend to commit myself by saying that the defense could be made applicable even in equity; but if at all available, it must be maintained in equity.

I shall, therefore, find the issues in this case for the plaintiff, and assess the damages at the amount of the note.

HOWE MACHINE COMPANY vs. HADDEN *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—APRIL, 1878.

RE-INDORSEMENT OF NOTE.

EXTINGUISHMENT OF LIABILITY OF INDORSER.—Where A., the payee of a note, indorsed it to B., who in the course of trade re-indorsed it to A., and then A. indorsed it to the plaintiff: *Held*, that the re-indorsement from B. to A. created no liability on the part of B. to A. nor to the plaintiff.

Action by the Howe Machine Company against Hadden, Good, and Fisher on four notes of $500 each, executed by Hadden to Good. The latter assigned the notes by indorsement to Fisher, who afterwards assigned them by indorsement to Good, who assigned them by indorsement to plaintiff. The third note was past due before any of the indorsements were made on it. In each paragraph of the petition it is alleged "said Good indorsed the same (note) to the defendant Fisher, who in course of trade indorsed the same to said

Good, who in like manner indorsed the same to the plaintiff." Copies of the notes and indorsements were made part of each paragraph. The defendant Fisher demurred.

Baker, Hord & Hendricks, for plaintiff.

Dye & Harris, for defendants.

GRESHAM, J.—It is clear that Good could not maintain an action against Fisher on the latter's indorsements. The law presumes from Good's possession of the notes, after their re-indorsement to him by Fisher, that they were paid by Good as the first indorser. And further, if Good could sue Fisher on the latter's indorsement, Fisher could turn round and sue Good on his prior indorsement. To prevent this circuity or multiplicity of actions, the law in such cases, allows the liability of the first indorser to extinguish the liability of the second.[1] Fisher's liability being extinguished as between him and Good, can the plaintiff, Good's indorsee, recover from Fisher? In reason it would seem not unfair to say that the indorsement and possession of Good, the payee, was *prima facie* evidence that he had got the notes back by payment or purchase. But if the indorsements on these notes were in blank there is authority for saying the presumption would be that Fisher had signed for the accommodation of Good. If a bill or commercial note be bought from the maker or some prior indorser before maturity, in good faith, the indorsement being in the usual form, in blank, the presumption is that the subsequent indorsements were made for the accommodation of the maker or prior indorser.[2] The

[1] Byles on Bills, 154; *Bishop vs. Hayward*, 4 Term Reports, 470.

[2] *Palmer vs. Whitney*, 21 Indiana, 58; *Runyan vs. Reed*, 6 American Law Register, (o. s.) 305; *Maulden vs. Branch Bank*, 2 Alabama, 502.

third note in suit was past due some time before any of the indorsements were made on it; as to it there is no ground for presuming that Fisher indorsed for Good's accommodation. The indorsements on the first, second, and fourth notes are without date, and the presumption is that they were made before maturity. But it will be observed that all the indorsements are special. Good, Fisher, and the plaintiff are the only persons who have held the notes. Good, the payee, indorsed to Fisher, who re-indorsed to Good, who then indorsed to the plaintiff. The plaintiff had no right to infer that Fisher had indorsed for the accommodation of Good. In fact, the special indorsements were notice to the plaintiff to the contrary, and informed it that Good had come into possession of the notes by payment or purchase. Knowing this, the plaintiff had no more right to buy the notes from Good, expecting to hold Fisher liable, than if it had known that Good had released Fisher for a consideration. It will not do for the plaintiff to insist that Fisher must be held to have indorsed for accommodation of Good, when in each paragraph of the complaint it is alleged that "said Good indorsed the same (note) to the defendant Fisher, who in course of trade indorsed the same to said Good, who, in like manner indorsed the same to this plaintiff."

Demurrer sustained.

C. A. TWICHELL vs. E. A. MEARS.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—MAY, 1878.

PERSONAL LIABILITY OF PURCHASER OF EQUITY OF REDEMPTION.—When the payment of an outstanding incumbrance, created by the grantor of the equity of redemption, constitutes part of the purchase money, the law implies an undertaking by the purchaser to pay it, and the mortgagee may recover in assumpsit.

Kirk Hawes, for plaintiff.

W. E. Furness, for defendant.

BLODGETT, J.—This is an action brought on an alleged promise by defendant to pay the amount of a trust deed, in the nature of a mortgage, made by Austin H. Stowell to the plaintiff, on a certain lot in Highland Park. The proof shows that Stowell was the owner of the lot in question, and had borrowed of the plaintiff fifteen hundred dollars, which was secured by a mortgage on the lot; that he sold the lot to the defendant on the 15th day of April, 1875, for the sum of three thousand and twenty-five dollars, of which sum the mortgage in question was a part. The deed from Stowell to the defendant was for the express consideration of three thousand and twenty-five dollars, and contained the following clause:

"This deed is given subject to an incumbrance of fifteen hundred and seventy-five dollars, secured by a deed of trust, dated October 1, 1874, of which seventy-five dollars is payable in one year, and fifteen hundred dollars payable in two years, respectively, from the date hereof; said fifteen hundred

dollars bearing interest, at the rate of ten per cent. per annum, payable at the office of Kirk Hawes, in the city of Chicago; which said fifteen hundred and seventy-five dollars, with the accrued interest thereon from February 1, 1875, to April 15, 1875, is part of the consideration above named."

It also appears from the evidence that the defendant has paid one year's interest on this incumbrance.

The defendant insists that there is no privity of contract between the parties; that the mere purchase of the equity of redemption, or the purchase of the property subject to the mortgage, did not create such a privity of contract between him and the mortgagee as authorizes the mortgagee to maintain this action against him; that the law will imply no promise from such circumstances.

The rule is probably as contended for by the defendant's counsel, that the purchase of an equity of redemption from a mortgagor of real estate, does not make the purchaser personally liable to the mortgagee. But where the payment of an outstanding incumbrance, created by the grantor, constitutes part of the purchase money, the law implies an undertaking by the purchaser to pay it, and the mortgagee may recover in assumpsit. The legal effect of the transaction is, to leave the portion of the purchase money represented by the incumbrance, in the hands of the purchaser for the purpose of paying the incumbrance, and the promise being made for the benefit of the holder of the incumbrance, he may maintain an action to enforce it. This is amply sustained, I think, by *Burr vs. Beers*, 24 New York, 178; *Comstock vs. Hitt*, 37 Illinois, 542; *Garnsey vs. Rogers*, 47 New York, 234; *Thompson vs. Thompson*, 4 Ohio State, 333; *Cumberland vs. Codrington*, 3 Johnson's Chancery, 229. There is also a series of cases in the Pennsylvania State Courts to the same effect; but perhaps they would not be considered so much in point as the cases I have quoted,

from the fact that they make no distinction between law and equity in that state, and many of the English cases proceed upon the assumption that while there may not be a remedy at law, there would be one in equity. But the cases I have cited are those where the principle is broadly laid down as I have assumed it—that an action at law may be maintained where the mortgage forms part of the consideration. The rule in this state is stated by Justice BREESE, in *Comstock vs. Hitt*, *supra*, and I think very happily and tersely stated: "Taking a deed subject to an outstanding mortgage, creates no personal liability of the grantee to pay off the mortgage, unless he has especially agreed to do so, or the amount of the mortgage has been deducted from the purchase price. When the payment of an outstanding mortgage is a part of the purchase price of the land, the law will imply an agreement to pay it."

The parol evidence and the deed, in this case, both show that the payment of the mortgage was a part of the consideration which the defendant agreed to pay for the land sold him by Stowell, which facts bring this case clearly within the rule laid down by the Supreme Court of this state, which I have just quoted. So, too, Chancellor KENT, in *Cumberland vs. Codrington*, *supra*, says: "The leaving of so much money in the hands of the purchaser for the use of the mortgagee, would seem to be a sufficient ground for a suit at law by the mortgagee."

Other authorities to the same point undoubtedly exist, but it seems to me that these are sufficient to dispose of this case.

There will be a finding for the plaintiff.

GEORGE I. GILBERT *et al.* vs. WILLIAM T. GAUGAR *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JUNE, 1878.

1. TIME CONTRACTS—STATUTE CONSTRUED.—The Illinois Statute (Rev. Stat., Chap. 38, Sec. 130), was not intended to prohibit sales of grain or other commodities for future delivery where the seller reserves to himself a simple option as to the time of delivery within certain limits.

2. ADJUSTING DIFFERENCES—LIABILITY OF CUSTOMER TO BROKER.—If one makes a contract to deliver grain during a future month at a fixed price, and by reason of the adverse aspect of the market, directs his brokers to settle with the purchasers before the maturity of the contract, this does not make the contract void as a gambling transaction, and he is liable for the differences paid by the brokers in his behalf as well as for their commissions.

Plaintiffs, who were brokers and commission men on the Chicago Board of Trade, composing the firm of Gilbert, Wolcott & Co., brought this action to recover from defendants, their principals, for commissions earned, and losses paid by plaintiffs in settlement of time contracts for the sale of grain by plaintiffs for account of defendants. The facts, about which there was no dispute, were, that during the year 1874, plaintiffs were engaged in business as commission merchants and brokers, in this city, and members of the Board of Trade. The defendant, Gaugar, was engaged in business at Kankakee, in this state, as a buyer and shipper of grain; defendant Holmes also resided in Kankakee.

Prior to August, 1874, plaintiffs had made several transactions on the Board of Trade for Gaugar, some of the contracts to sell for future delivery being filled by shipments of grain from Gaugar, and others being settled by adjusting

the differences with the purchasers. A short time prior to August, 1874, Gaugar requested plaintiffs to sell some corn on the board, for future delivery, and stated that defendant Holmes would take a half interest in the transaction. On the 3d of August, Holmes was in Chicago, and, pursuant to the arrangement made with Gaugar, ordered plaintiffs to sell for the joint account of himself and Gaugar, ten thousand bushels of corn for delivery in the month of September, the seller having the option to deliver at any time during the month of September. The plaintiffs on the same day, pursuant to direction, sold to Hurlbut & Co., ten thousand bushels of corn for September delivery, at 63⅛ cents per bushel.

This transaction was afterward, by consent of all parties, changed to a sale for October delivery, and on the 9th day of September, plaintiffs, by order of defendants, sold to W. E. Furness another ten thousand bushels of corn for October delivery, at 78⅞ cents. The market continued to advance, and on the 18th of September, plaintiffs, by order of defendants, closed the transaction by buying from Hurlbut & Co. ten thousand bushels of corn; of Trego & Smith, 5,000 bushels, and 5,000 bushels of McDermid & Oertel, all for October delivery; and with the corn so bought filled the contracts of sale theretofore made. At the time of the sale to Hurlbut & Co., plaintiffs had no corn on hand representing that transaction, and it does not appear that Hurlbut & Co. delivered any corn to plaintiffs on the September purchase. The loss on the two transactions was $1,856.25, and plaintiffs charged for their commission $100, making a total loss by defendants, for differences paid by plaintiffs and plaintiffs' commissions, of $1,956.25. Of this amount, defendants repaid plaintiffs $825, leaving a balance of $1,131.25 unpaid, for which this suit was brought. No corn was ever shipped by Gaugar to plaintiffs to fill either sale, but plaintiffs were

ordered by defendants to close out the transaction on the Board of Trade on the best terms they could. The contracts of sale were substantially in the following form:

[*Grain Contract.*]

CHICAGO, Aug. 3, 1874.—We have this day bought of George I. Gilbert & Co., ten thousand bushels No. 2 corn, in store, at 63⅛ cents per bushel, to be delivered at sellers' option during the month of October, 1874, in lots of five thousand bushels each. This contract is subject in all respects to the rules and regulations of the Board of Trade of the city of Chicago.

HURLBUT & Co.

[*Grain Contract.*]

CHICAGO, Aug. 3, 1874.—We have this day sold to Hurlbut & Co., ten thousand bushels No. 2 corn, in store, at 63⅛ cents per bushel, to be delivered at sellers' option, during the month of October, 1874, in lots of five thousand bushels each. This contract is subject in all respects to the rules and regulations of the Board of Trade of the city of Chicago.

GEORGE I. GILBERT & Co.

J. L. High, for plaintiffs.

C. H. Wood, for defendants.

BLODGETT, J.—The fair conclusion from the admitted facts, I think, is that one transaction was made to settle and adjust the other. In other words, the differences between the prices at which the sales were made and the prices of the purchases, were settled, and the plaintiffs paid the losses to the buyers.

The sole defense made, is, that the transaction falls within the option contract law of this state: Revised Statutes, Chapter 38, Section 130, and is void as a gaming contract. The language of the statute is: "Whoever contracts to have or give to himself or another *the option to sell or buy* at a future time any grain, etc.," shall be fined. "And all contracts made in violation of this section shall be considered gambling contracts, and shall be void."

This statute has been several times before the Supreme Court of this state for construction, and the uniform ruling, so far as I have been able to learn from adjudged cases brought to my notice, has been that the statute was not intended to prohibit sales of grain or other commodities for future delivery. The statute prohibits "*options to sell or buy*"—not sales where the seller reserves to himself a simple option as to the time of delivery within certain limits:[1]

Rumsey vs. Berry, 65 Maine, 570, gives the same construction to a statute similar to ours, by the Supreme Court of Maine.

Lyon vs. Culbertson, 83 Illinois, 33, and *Pickering vs. Cease*, 79 Illinois, 328, would seem at first to hold a different doctrine, but a careful examination of those cases shows that the court proceeded upon the fact found, that neither party expected, at the time the contracts were made, to deliver any wheat, but only to adjust or settle differences. These two cases also differ from this in other important features. In both those cases the suits were directly between the parties to the contracts, and the court held them to be gaming contracts, because it was found as a fact that neither party intended to sell or buy the wheat, but only to speculate in differences, transactions which the court held were contrary to public policy, and therefore void. And while it may be well, as a matter of public policy, to prevent parties from gambling by refusing to enforce gambling contracts between them, yet it is at least doubtful whether they should be allowed to gamble at the expense of others, and not pay those whom they employ to do the work, and who advance money for them.

The obvious intent of the Illinois statute is to prohibit

[1] *Wolcott vs. Heath*, 78 Illinois, 433; *Pixley vs. Boynton*, 79 Illinois, 351; *Logan vs. Musick*, 81 Illinois, 415; *Corbett vs. Underwood*, 83 Illinois, 324.

dealing in what are familiarly called "puts" and "calls," which are mere options to sell or buy; a class of contracts which the District Court of this district had held void before the statute was enacted. *Ex parte Young*, 6 Bissell, 53. But in that case the court took pains to say, p. 66: "I do not intend to be understood as holding that every option contract for the delivery of grain or stock, or that every 'put' is necessarily void, but only that all these contracts, in the light of the testimony before the court, were, in their essential features, gambling contracts. The parties, when they made them, did not intend to deliver the grain, but only at the utmost to settle the differences," thus clearly distinguishing that case from this. But even under the English acts for the prevention of stock jobbing, it was held that when a broker had paid money on defendant's account, to compromise or settle differences for not delivering stocks, the broker could recover from the principal.[1]

As early as 1857 the learned circuit judge of this circuit held that a contract substantially like the ones under consideration was valid: *Porter vs. Viets*, 1 Bissell, 177. So in *Lenman vs. Strassberger*, 2 Woods, C. C., 554, Judge Woods, of the Fifth Circuit, sustained a cause of action almost identical with this. But the most full and exhaustive discussion of the question which I have met, is found in the case of *Clarke, Assignee, vs. Foss*,[2] by the learned district judge of the Western District of Wisconsin, and the doctrine of that case fully sustains the plaintiffs' right of recovery in this case. To further discuss the questions raised

[1] *Faikney vs. Reynous*, 4 Burrows, 2,069; *Petrie vs. Hannay*, 3 Term Reports, 418; *Knight vs. Cambers*, 15 Common Bench, 563; 80 English Common Law, 561; *Jessopp vs. Lutwyche*, 10 Exchequer Reports, 624; *Rosewarne vs. Billing*, 15 Common Bench, N. S., 316; 109 English Common Law, 316.

[2] 7 Bissell, 540.

here, after the full examination they have received in the two cases last cited, seems to me unnecessary.

I therefore conclude that the contracts made by plaintiffs, in defendants' behalf, were not options to sell or buy, but lawful contracts to deliver corn at a future day, upon which defendants might have been liable for the difference between the price at the time at which they sold and agreed to deliver, and the market price at the maturity of their contract. And if, by reason of the adverse aspect of the market, they directed the plaintiff to settle with the purchasers before the maturity of the contract, they are liable for the differences paid by the plaintiffs in their behalf, as well as for plaintiffs' commissions.

MATTHEW GOTTFRIED *et al.* vs. FRANK BARTHOLOMAE *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JUNE, 1878.

IN EQUITY.

PATENT LAW.—A patented invention is not anticipated by a prior device capable of producing the same results, but by different and more complicated and costly processes.

Banning & Banning, for complainants.

Jussen & Anderson, for defendants.

BLODGETT, J.—These are suits brought by the complainants as the owners of a patent issued by the United States to

J. F. T. Holbeck and M. Gottfried, dated May 3, 1864, for an improved mode of pitching the inside of barrels. The complainants' invention consists of a device by which air is driven through fire by a fan or blower, where it becomes heated to a high temperature, whence it is forced by the blast into the barrels so as to heat the inside of the barrels sufficiently to melt the pitch or resin, which is used for the purpose of pitching the insides, so that it will readily flow into the cracks or pores of the wood. The cask is then closed and rolled until the melted resin has covered the entire inner surface. The complainants' device is a furnace, with grate bars in the bottom upon which the fire is built with anthracite coal or any other combustible; underneath the grate bars comes a pipe, to which is attached a fan or blower by which the blast of air is driven into and up through the ignited combustible—coal or wood, as the case may be—into the dome or air chamber over the grate, and from this air chamber a nozzle projects, to which the cask or barrel to be pitched is attached, by the nozzle being inserted in the bung hole, so that the air, which becomes heated by being forced through the fire, is expelled through the nozzle into the cask, thereby heating the inside of the cask to such an extent as to melt the pitch or resin.

The defendants' two devices embody applications of the same principle. One is a portable device in which the fan or blower is attached by a pipe at the bottom; the air is driven through the fire, there being a grate bar in the bottom, and the cask is attached upon the pipe. This is called the Vogt Machine. The other, also portable, involves the same principle, but is so adjusted as to receive a larger number of casks, the casks being suspended upon hooks so that the air nozzles fit into the bung holes, and the air is driven into them. This is known as the Shlaudeman Machine. The object of all these devices is simply to coat the

inner surface of the cask with pitch or resin, so as to make it more capable of holding liquids, especially ales and beers.

It must be admitted, I think, that the devices—that of the complainants and those used by the defendants—are alike in their mode of operation and effect. There is no substantial difference in the principle upon which they operate; they both accomplish the same end by substantially the same means; that is, a blast of air driven through the fire and escaping into the cask. The defendants contest the novelty of the complainants' device, and in support of their position rely upon a patent granted in England to Robert Davison and William Symington in November, 1843, and upon the various devices for producing a hot air blast in furnaces, such as the Neilson blast and the various other hot air blasts used in smelting furnaces, where heated air is driven into the furnace for the purpose of securing a higher degree of heat and increasing the melting power of the furnace.

The Davison and Symington device was specifically arranged for the purpose of cleansing barrels. We have no model of that, but we have the specifications and drawings in connection with it. They show an arrangement for cleansing the inside of casks and barrels, and the inventors specially say that it is adapted to the cleansing of beer and ale casks particularly, so as to renovate them and make them available for further use. That device combined several applications. One was the use of hot air which was driven into the cask by a blast, in the same manner as in this case, except that the air was heated by being driven through heated tubes; that is, a nest or group of iron pipes was arranged in a furnace, and the pipes becoming hot, the air was driven through them into the cask, whereby the inner side of the cask became heated. By that it was claimed the must and various impurities were expelled. The same de-

vice, also, combined a mechanism for introducing a rough chain into the inner side of the barrel, and shaking or rolling the barrel with the chain inside, whereby the barrel was cleansed of impurities which stuck to the inside. Sometimes, instead of using the chain, they used gravel or any other substance by which attrition upon the inside of the cask could be obtained. A further device was connected with the same mechanism for driving steam at a high temperature into the cask for the purpose of still further cleansing.

All these devices were intended really to cleanse the inside of the barrel, and not to pitch it; but it is obvious that heating the inside of the barrels, so as to melt the pitch, could have been accomplished by the Davison and Symington process; that is, when you once conceived the idea of the necessity of the pitching or coating the inside of the barrel with any substance susceptible of being melted, it could be heated by the Davison and Symington process as readily as by the complainants' process; but the mechanism, it is noticeable, by which the heating was obtained is widely different.

The complainants' process is, perhaps, the simplest process by which air can be heated and then driven into casks, and so simple that one can hardly deny that they should have a patent upon it if they were the first to invent it. All you have to do is to apply a simple fan or blower, and drive the air through the fire. What the fire does not consume will, of course, escape into the cask in a heated condition, heated to the extent of the intensity of the fire. And one of the merits, so to speak, of the device is that by the very process of blowing or driving the air through the fire, you increase the intensity of the fire, and therefore the intensity of the heat of the air which escapes into the cask. It is true that with the heated air will go some smoke and the products of combustion, such as the carbonic acid gas, etc., but for the

purpose for which the complainants apply their device, that is not objectionable—the only object being to get the inner surface of the cask heated sufficiently to melt the resin or other substance with which it is desired to coat it. That is accomplished by this process readily. And while, as I have already said, the Davison and Symington process may produce the same results, yet they produce them by a different mechanism, and a mechanism much more costly; it costs much more to make a machine, and fully as much if not more to operate it; you would have to produce heat enough in your furnace and around your pipes to make the air sufficiently hot, and then keep up that heat by an additional blast of air into your furnace in addition to the blast which drives the air into your cask. So that the two mechanisms, while they produce the same result and reach the same end, do it by two different processes. Therefore, I do not think the Davison and Symington device anticipates the complainants.

As I have already stated, the defendants' devices are but other forms of the complainants' device. The complainants drive their air by a fan or blower through the fire upon the grate bars, into the cask to be heated; the defendants do the same and by substantially the same mechanism. The method of attaching the pipe at the bottom, or anywhere below the grate bars is the same, and undoubtedly an infringement of the complainants' patent.

It is urged that the Shlaudeman device is different, because that is a device by which the air can be driven directly from the fan or blower into the cask. That would simply drive cold air in, or at the most the air would only become heated to the extent of whatever heat there was in the chamber over the fire, as the air would not pass through the grate bars. But in so far as this machine provides for driving the air through the fire by turning a cock and clos-

ing the direct entrance into the chamber above the fire, the moment the upper aperture is closed, it becomes the complainants' machine to all intents and purposes.

I therefore find, that the infringement is clearly made out and that the complainants are entitled to the relief claimed. Injunctions will accordingly be granted, and references ordered to the master to take proof and report the damages the complainants have sustained by the defendants' infringement.

UNITED STATES vs. GOODRICH TRANSPORTATION COMPANY.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—JUNE, 1878.

TRANSPORTING BARRELS WITH UNCANCELLED STAMPS.—In an action to recover a penalty under Section 3,324 of the Revised Statutes, for transporting empty barrels upon which were uneffaced Internal Revenue stamps: *Held*, that the defendant was bound to know whether or not there were stamps upon the barrels, which had not been effaced or obliterated.

Action to recover penalty under Section 3,324 of the Revised Statutes, for transporting empty barrels which had theretofore contained distilled spirits, and upon which, it was claimed, were internal revenue stamps not effaced or obliterated as required by law.

G. W. Hazelton, for United States.

Murphey & Goodwin, for defendant.

DYER, J. charged the jury as follows:

Testimony has been given tending to show that the defendant received on board one of its boats at Green Bay, for transportation to Milwaukee, and that it transported empty barrels having thereon, uneffaced and unobliterated, certain stamps required by law to be placed on any cask or package containing distilled spirits.

Testimony has also been given on the part of defendant tending to show that these barrels had been stored for a considerable time before such transportation, that they were old barrels, and that the heads of the same were covered with dust and dirt and water stains, so that the stamps were to some extent obscured and not readily discernible upon ordinary observation, and that they were received by defendant for transportation and were transported from Green Bay to Milwaukee, in connection with and as part of a large number of other barrels upon which the stamps had been effaced or obliterated.

Upon the state of facts presented by the entire testimony, I am asked by defendant's counsel to instruct you that if the defendant by its agents and employés exercised reasonable care and watchfulness in observing the condition of said barrels when they were received for transportation, and if in the exercise of such care, they failed to ascertain that the stamps upon the same were uneffaced and unobliterated, for the reason that such stamps were obscured from ordinary view by the presence of dirt, dust and stains upon the heads of the barrels where the stamps were placed, the defendant is not liable in this action. I must, in the view I take of the statute, decline to so instruct you.

The statute (Section 3,324 Revised Statutes) provides, that every transportation company which receives or transports or has in possession with intent to transport, any empty cask or package having thereon any brand, mark or stamp

required by law to be placed on any cask or package containing distilled spirits, shall forfeit three hundred dollars for each such cask or package so received or transported or had in possession with intent to transport. This is one of the most important provisions of the Internal Revenue law, and I am of the opinion that under a proper construction of its requirements the defendant was bound to know whether or not there were stamps upon these barrels that had not been effaced or obliterated. The statute is positive in its terms, and the question is, did these barrels have upon them stamps, uneffaced, as claimed; not, did the defendant discover them or could it discover them by the exercise of reasonable care and ordinary observation. It was the defendant's duty, before receiving them for transportation, to ascertain whether there were or were not uncancelled stamps upon these barrels, if it would escape liability under this statute, and as I have before said, it was bound to know what was the fact; and although the stamps may have been obscured as claimed, if they were upon the barrels uneffaced and unobliterated, and if the defendant received the barrels with the stamps upon them for transportation, and transported them as alleged, then it is liable in the present action to the extent of three hundred dollars for each such barrel so transported.

Verdict for United States for twelve hundred dollars.

UNITED STATES vs. N. B. VAN SLYKE.

CIRCUIT COURT — WESTERN DISTRICT OF WISCONSIN — JUNE, 1878.

1. MEANING OF "PROPRIETOR."—In Section 3,251 of Revised Statutes, by which it is provided that every proprietor of any still shall be liable for taxes on the distilled spirits produced therefrom, the word "proprietor" is used in the sense of an owner, who, whether in personal possession or not, has the exclusive right to, and the control over, the premises.

2. A lessee is a proprietor, but the lessor is not.

3. INTEREST OF DEFENDANT.—Under the same section, in order to hold the defendant liable as being interested in the use of the still, a direct interest in the business must be shown. His interest as a lessor, or as a creditor who expected to collect his claims if the business proved successful, is not sufficient.

4. CROOKED WHISKEY.—Knowledge by defendant that illicit spirits were being manufactured on the premises, does not render him liable for the tax.

This action was brought to recover the sum of twenty-two thousand and five hundred dollars, alleged to be due the Government from the defendant for taxes upon illicit spirits manufactured at the Middleton Distillery, near Madison, Wis., between September 3, 1873, and April 24, 1874.

The complaint alleges that the defendant was the owner and proprietor of the distillery and distillery premises at the time of the manufacture of the spirits, and interested in the profits of such manufacture with one Alexander L. Rogers and Charles H. Bunker, who had the immediate control and management of the business.

The defendant admitted that he held the title in fee to the premises, but denied that he was the proprietor or interested in any way in the manufacture of the liquors.

The evidence was, that prior to 1873 the premises were

owned by one Jacob Lentz, and that Lentz, and subsequently Lentz & Rogers, carried on the business; that the defendant, as president of the First National Bank of Madison, advanced money to Lentz & Rogers, and discounted their paper to a large amount to enable them to carry on this and other branches of business, and that defendant, to secure these advances, took a mortgage from Lentz on the distillery premises, which was foreclosed, and the premises bid in by the defendant. After this the distillery was idle for some months, until on the 11th of August, 1873, the defendant let the real estate to Rogers, who entered again into the manufacture of spirits, Rogers obtaining a license from the Government to carry on the business until May 1, 1874, and defendant, as owner of the premises, gave his consent as required by law that the premises be used for that purpose, and stipulated that the lien of the United States for taxes and penalties should have priority of his rights, and that in case of forfeiture of the premises the title should vest in the United States. From September, 1873, until April 24, 1874, Rogers, in connection with one Charles H. Bunker, whom he took in as a secret partner, manufactured a large quantity of illicit wines and spirits, which they took to Madison, where they were rectified under the immediate management of Bunker, without the payment of the taxes.

On April 24, 1874, the distillery and distillery apparatus were seized by the officers of the Government, and they, as well as the real estate, forfeited to the United States. During all this time the defendant, as president of the bank, continued to advance money to Rogers and to discount his paper, to enable him to carry on the business, in the hope of getting back, as he alleges, some of the amount previously advanced to Rogers and to Lentz & Rogers. The attorney for the Government claimed that such money was advanced as partner in the business and as proprietor of the distillery;

and claimed, also, that if the evidence did not establish this fact, and that the defendant was interested in the profits of the manufacture, that he was still liable for the taxes as *proprietor* of the premises under Section 3,251 of Revised Statutes, which provides as follows: "Every proprietor or possessor of, and every person in any manner interested in the use of any still, * * * shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom."

J. C. McKenna, for United States.

J. C. Sloan and *Wm. F. Vilas*, for defendant.

BUNN, J., charged the jury as follows:

The law makes every proprietor or possessor of, and every person in any manner interested in the use of any still, distillery or distilling apparatus, liable for the taxes imposed by law on the distilled spirits produced therefrom.

The Government, who is the plaintiff in the case, alleges that the defendant, during the time in question, was the owner and proprietor of the still and had an interest as partner, or otherwise, in its use. The defendant admits, and the evidence shows, that he was the owner of the premises on which the distillery was situated, but he denies that he was the proprietor in the sense in which that word is used in the statute, and denies that he had any interest in the use of the still. And this constitutes the issue which the jury are to try. The issue is simple, and all I desire is to call your attention to it, and to state the law applicable to the case without restating the evidence which is fresh in your minds and has been fully and ably discussed by counsel on both sides.

First, then—Was the defendant the proprietor of the distillery from August 11, 1873, to May 1, 1874, during the

time when it is charged the spirits were manufactured on which the taxes have not been paid? The evidence shows that he was the owner of the distillery premises and had let them out by written lease to one Alexander L. Rogers, who was in possession of and running the still.

I think the word proprietor is used in the statute in the sense of an owner, who, whether in personal possession or not, has the exclusive right to, and the control over, the premises. A person in possession of premises as lessee under a lease for years, has himself, as against the general owner and all the world, the right to the exclusive possession, control and management of the same during the continuance of the lease, and is for all such purposes as much the proprietor of the premises, for the time being, as though he held the legal title in fee. And I think it was never the intention of the law to make the general owner of premises so leased, and not himself having any right to the possession, control or management of the premises or business carried on, and having no interest in the distillery business except to receive his stipulated rent, liable for the payment of the taxes imposed by the Government on the spirits distilled. I think, on the contrary, the purpose of the law is to make every person, whether possessor or proprietor, who has any control of the business, and every person having an interest in the use of the still, whether possessor, owner, partner, or otherwise, liable for the payment of taxes so imposed.

So, I think, if you should find the facts to be that Rogers or Rogers and Bunker, during the time in question, had the exclusive possession of the distillery under the lease from the defendant, and the exclusive control and management thereof, and that defendant had no other interest than to get the rent, or to obtain payment of the indebtedness due from Rogers, or Lentz & Rogers, to the bank on account of the then present or previous deal, the fact of his being the

owner of the real estate and letting it to Rogers, would not render him liable to the payment of the taxes imposed on the highwines produced at the distillery.

And in that case you will next inquire and determine from the evidence whether the defendant was in any manner interested in the use of the distillery during that time; for if he was, then he should pay the taxes. But I think there is no doubt that the interest, to make defendant liable, should be a direct interest in the business, and not merely an indirect interest in the success of the business as belonging to other persons. If the business was in fact his, or he was interested as a secret partner, or otherwise in the profits, then he will be liable for the taxes on the products of the still. But if the business belonged to Rogers, or Rogers & Bunker, and they alone were entitled to the proceeds, and the defendant was only interested in having them succeed because their success would the better enable Rogers or Bunker to pay moneys advanced by the bank of which defendant was president and stockholder, to Rogers, or to Lentz & Rogers, or to Bunker, for the purpose of paying taxes on the highwines, or to carry on the business, then I think the defendant would not be liable. Nor is the fact of his having bought cattle to be fed at the still, sufficient of itself to show such an interest in the distillery business as would make him liable for the taxes; but of course the evidence upon that subject should be considered by the jury in connection with the rest of the testimony in consideriug and determining what the true character of the whole transaction was, and whether or not defendant had in fact an interest in the profits of the distillery business. That question the jury are to determine fairly from a full and comprehensive view of the whole case, and from the weight of the testimony taken as a whole. What do you believe? What is the conviction produced in your minds by the evidence? You are the sole judges of the

weight to be given to the testimony of the several witnesses, and upon the testimony, taken in connection with the contracts, papers, and record evidence in the case and all the circumstances, you are to determine the fact. The written contracts introduced in evidence do not, upon their face, show any such interest on the part of the defendant as would render him responsible for the taxes. But it is insisted by the government attorney, and his evidence is intended to show, that these contracts do not represent fairly the real transaction, but on the contrary, were not made in good faith, and were intended rather as a cloak to cover the real transaction according to which it is alleged the defendant had a direct and substantial interest in the profits and products of the distillery business. As the lease and contracts are fair on their face, and do not, of themselves, show any such interest on the part of the defendant, the burden is on the Government to satisfy you by a preponderance in the weight of testimony that these papers and agreements do not represent truly the whole case, and that the defendant, notwithstanding, had a real interest in the business. And this question is fairly presented by the evidence, and must be submitted for your careful consideration and determination.

The business of rectifying is distinct in the law from the business of distilling, and has no necessary connection with it, and if you shall believe from the evidence that defendant had an interest either alone or with Bunker in the business of rectifying, that of itself would not render him responsible for taxes on the highwines used in that business, though he may have known that the taxes on the wines received from the distillery had not been paid. But it would be necessary to go further and show that he had an interest in the distillery business itself. But this, of course, should not prevent a full consideration by the jury, of the circumstances attending the defendant's relations with Bunker in respect to

the rectifying business, and the real nature of the transaction between them, as bearing upon the main question at issue in the case—to-wit: whether or not defendant was in any manner interested in the use of the still. For in determining that question, as before said, it will be your duty to consider all the evidence and circumstances in the case.

Again, the jury will understand that the defendant's liability to the payment of the tax, turns upon the question of his being a proprietor or possessor of the still, or interested in the use of the still, and not upon the question of his knowledge or want of knowledge, as to how the distillery was being run, whether "straight" or "crooked." So that the fact of defendant's having notice that illicit wines were being made by Rogers at the distillery would not make him liable for the tax, if all the interest he had in the success of the business was to collect the debt due the bank for rent and for moneys advanced. But his knowledge, if he had such knowledge, that the distillery was being run contrary to law and that the taxes were not being paid, and his conduct in relation thereto, are all to be considered as part of the evidence in this case, and it is for you to say how far they bear upon the question of his interest in the distillery business.

Nor would the fact, if such were the fact, that Bunker after he went into the rectifying business, formed a secret partnership with Rogers in the distillery business, unknown to defendant, though you may believe that defendant was interested in the rectifying business alone or with Bunker, render the defendant liable for the taxes on the spirits distilled at the distillery.

Verdict for defendant.

Motion for new trial heard before Judges DRUMMOND and BUNN and overruled.

WILLIAM G. HARDS *et al.* vs. CONNECTICUT MUTUAL LIFE INSURANCE CO. *et al.*

CIRCUIT COURT — NORTHERN DISTRICT OF ILLINOIS — JUNE, 1878.

IN EQUITY.

1. MORTGAGE — FORECLOSURE — TIME FOR REDEMPTION.—After a decree of this court foreclosing a mortgage, an objection that it does not give the time allowed for redemption by the Illinois statutes cannot be urged by creditors of the mortgagor except in connection with an offer to redeem.

2. FOREIGN INSURANCE COMPANY — INVESTMENT — PUBLIC POLICY.—Insurance companies created by the laws of other states do not contravene the public policy of Illinois by investing their assets in mortgages upon real estate within that state.

3. MECHANIC'S LIEN—LIS PENDENS.—After bill of foreclosure filed by mortgagee, it is not within the power of the mortgagor pending the suit, by contract with a mechanic without the consent of the mortgagee, to create an incumbrance upon the property which can in anywise affect the rights of the mortgagee, as they may be declared by final decree.

On bill and demurrer. In June, 1872, defendant filed a bill in this court to foreclose a mortgage for $20,000, executed by Sprague, in 1867, upon certain real estate in Chicago. March 17, 1874, a decree was entered giving the relief asked, ordering a sale and giving the mortgagor six months' time within which to pay the mortgage debt. The mortgagor failing to comply, the property was sold in November, 1874, Greene becoming the purchaser in the interest of the company. In January, 1875, a deed was made to the purchaser. The present bill was filed in January, 1875, praying a reversal of the foreclosure decree. It appears that in September, 1873, Sprague, the mortgagor, contracted with

complainants to do certain plastering and carpenter work on the mortgaged premises. Hards, in December, 1873, filed his petition in a state court for a mechanic's lien, and in November, 1874, amended his petition, making Greene and the insurance company defendants. In May, 1874, the other complainants filed a petition for a mechanic's lien in the same court against the same parties. The company and Greene pleaded the decree of this court in bar, and as against Hards they specially pleaded the limitation of six months prescribed by the mechanic's lien statute of this state. The bill here filed alleges that the insurance company were aware of the work, etc., being done, but had failed to make complainants parties to the foreclosure suit, and that the latter were ignorant of the pendency of that suit, and that the insurance company was forbidden by the laws of Illinois from taking the mortgage of 1867. The defendants demurred.

Herbert, Quick & Miller, for complainants.

Isham & Lincoln, for defendants.

HARLAN, J. (Orally, after stating the facts.)—Counsel for complainants insist that the decree in the foreclosure suit was erroneous, in that it did not give the time for redemption allowed by the statutes of Illinois.[1] Touching this objection, it is sufficient to say that the creditors of the mortgagor cannot urge that objection except in connection with an offer to redeem the property by paying the mortgage debt. No such offer is here made. Complainants' counsel also insist that the mortgage of 1867 was void upon the ground that a foreign insurance company could not at that

[1] *Brine vs. Hartford Fire Insurance Company*, 6 Otto, 627.

date, consistently with the settled public policy of Illinois, take a mortgage upon real estate in this state. Waiving any consideration of the question as to complainants' right at this late day to urge such an objection, the mortgagor himself making no such point, it is clear that the mortgage was not void upon any such ground. After a thorough examination of all the authorities cited, the court is satisfied that neither at the time of the mortgage nor at any time since, has it been against the public policy of this state for insurance companies, created by the laws of other states, to invest their assets in mortgages upon real estate in Illinois. The cases of *Carrol vs. East St. Louis*, 67 Illinois, 568; *Starkweather vs. Am. Bible Society*, 72 Illinois, 50, and *U. S. Trust Co. vs. Lee*, 73 Illinois, 142, cited by complainants' counsel in support of his objection, do not embrace a case like this. Nothing is to be found in either of those cases which justifies the statement that the Supreme Court of Illinois has decided that insurance companies incorporated by the laws of other states may not take mortgages on real estate in Illinois if authorized by their own charter so to do. On the contrary, by a statute passed in 1869, domestic life insurance companies are required to invest a portion of their capital in certain specified securities, among which are mortgages of real estate. The same statute forbids any foreign life insurance company from transacting business in this state until it has also an equivalent capital invested in like manner. This statute, it is true, was passed after the mortgage in question was taken, but the reasonable presumption is that it would not have been passed had there been any such public policy as that assumed by complainants' counsel.

By the mechanic's lien law of the state, the lien of the mechanic must be asserted by petition within six months from the time his claim matures as against the incumbrancer.

Hards did not file his petition within that time as against the insurance company, and, therefore, his claim, in any event, is by the express terms of the statute, barred.[1] But there is, also, a fatal objection to both claims upon another ground. It arises out of the doctrine of *lis pendens*. Upon default by the mortgagor, the mortgagee had a right to foreclose. This court, having acquired jurisdiction of the parties and the subject matter in the foreclosure suit, it was not within the power of the mortgagor pending that suit, by contract with a mechanic, and without the consent of the mortgagee, to create an incumbrance upon the property which could in anywise affect the rights of the mortgagee as they might be declared by final decree. This was substantially held by the Supreme Court of Illinois in *Davis vs. Insurance Co.*, 84 Illinois, 508.

In that case the mortgagor, after the decree of sale, but before sale, made a contract with a mechanic. It was held that such a contract did not create an incumbrance upon the property as against the mortgagee, whose rights were settled and fixed by the final decree. The contract here was prior to the decree, but the reason, upon which the doctrine of *lis pendens* rests, applies to all such contracts made by the mortgagor, after the institution of a suit to foreclose. If the mechanics, by force of the statutes, acquired a prior lien, notwithstanding the pendency of the foreclosure suit, then, according to established rules, they were not affected by the final decree. If, however, they did not acquire a prior lien, but only one subordinate to that of the mortgage, then clearly they could not disturb the decree rendered here, nor have it set aside or modified, except by offering to redeem by paying the mortgage debt.

[1] *Dunphy vs. Riddle*, 86 Illinois, 22.

In reference to the doctrine of estoppel, there is no room for its application in this case. The mere knowledge of the insurance company and its agents that the complainants were doing work and furnishing materials upon the mortgaged premises, could not, in the absence of any assurance on the part of the company that their claim would be recognized notwithstanding the foreclosure proceedings, estop the company from insisting upon its rights under the foreclosure decree. The mechanics were bound to take notice of the suits pending in this court, and could not by any subsequent combination with the mortgagor defeat the full operation of the decree which this court rendered.

Demurrer sustained.

JAMES EDDY vs. ELVIRA C. BADGER *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JUNE, 1878.

IN EQUITY.

LOAN OF MONEY—COMMISSION—USURY.—The fact that the borrower of money pays commissions to the loan broker in addition to the lawful rate of interest to be paid the lender, does not make the contract of lending usurious, unless it appears that the claim for commissions was but a device to evade the usury laws.

The facts in this case were briefly as follows:

A. C. Badger and wife, on November 1, 1869, executed

a mortgage to James Eddy, of Rhode Island, for the sum of $30,000, payable in four years, with interest at ten per cent., payable half yearly, for which coupons were made. Subsequently a conveyance was made by Badger and wife to the defendant, Leiter. This was a suit by Eddy to foreclose his mortgage. Leiter, to save his land from the foreclosure, interposed as a defense against complainant's demand, that there was an usurious agreement for interest, in violation of the laws of Illinois, whereby all interest paid, and to which the complainant might otherwise be entitled, had been forfeited, and should go in reduction of principal.

Herbert, Quick & Miller, for complainant.

John H. Thompson, for defendants.

HARLAN, J. (Orally, after stating the facts.)—Waiving any consideration of the question, whether or not Leiter can raise that point in this case, and assuming that he may do so, I have been unable to concur in the views presented so forcibly by the counsel for defendant. The weight of the evidence is that Mr. Badger himself initiated the movement to obtain this loan. Certain it is that Mr. Seelye, who passed between the borrower and lender, had not, theretofore, represented Mr. Eddy in any like business. The transaction was just this: Badger applied to procure a loan of $30,000; Eddy agreed to loan that amount at ten per cent.; nothing was said by Eddy to the effect that Seelye was to be paid commissions, as a condition of the loan. I find no fact or circumstance in the case, showing that any obligation rested upon Eddy to compensate Seelye for effecting the loan. After the loan was completed, or, perhaps, at the time it was consummated, the question of commissions was raised between Seelye and Badger, and Badger finally paid him $750 for his commission. Badger

did not claim that Eddy was under obligation to pay commissions.

The question in the case is whether the payment of that $750 commissions by Badger to Seelye is to be regarded as interest accepted or received by the lender, thereby rendering the contract usurious. I am unable, from the testimony, to come to any other conclusion than that Badger was bound to Seelye for the commissions. But whether he was bound or not, it was no part of the contract or understanding between the lender and borrower that Seelye was to receive commissions for securing the loan; consequently the lender is not affected by the arrangement between Seelye and Badger, whereby the latter paid commissions to the former. All the cases referred to by counsel for the defendant are consistent with this view. I have been referred to no case which certainly establishes a contrary doctrine. The inquiry in all the adjudged cases is, whether the particular arrangement, alleged to be tainted by usury, was a device to evade the usury laws.

In each case cited by defendant, some fact or circumstance is found which justifies the conclusion that the agreement between the parties was a mere device to evade the usury laws. There is absolutely nothing in this case to show that the payment of the commissions to Seelye by Badger was either a part of the contract or was imposed by the lender as a condition of the loan, except the bare fact that the person through whom the loan was secured, received these commissions from the borrower. I am not able upon those facts to come to the conclusion that there was a device to evade the usury laws. I know of no reason why a man, desiring to borrow money, may not himself say to an individual, "Get me a loan for the amount I want, and I will pay you a commission." If that be the transaction, and the whole transaction, the fact that the borrower pays to that

person a commission for his services—not by virtue of any understanding or arrangement with the lender—is insufficient to sustain the charge of usury.

The case which learned counsel for defendant cited, decided by Judge DILLON, reported in the Central Law Journal, of May 26, 1876,[1] is not at all in conflict with this view. On the contrary, I do not hesitate to say that the decision of Judge DILLON was exactly right. In the report of that case it appears that McMechan, a merchant in Nebraska City, being financially embarrassed, applied to the Union Mutual Life Insurance Company of Maine, through J. F. Kinney, for a loan of twelve thousand dollars. Pending the negotiations therefor, it was learned that that sum would not be sufficient to accomplish the desired object, and it was therefore proposed to increase the loan to twenty thousand dollars. The conditions upon which this loan was made, were, that McMechan should take and pay for $36,000 of life insurance on the $12,000 portion of the loan, and for $40,000 insurance upon the $8,000 portion of the loan—the usual proportion $5 of insurance for $1 of money loaned, being reduced in consideration of the large amount. There was, says the report of the case, a further *condition* imposed by the lender, that the borrower should pay to Kinney, the general agent of the insurance company for Nebraska, three per cent. commissions upon the amount of loan for obtaining the loan, and the additional sum of $500 for services rendered in the case. From the sum to be advanced, there was deducted $1,456 for life insurance, premiums, etc.

Now, Judge DILLON held that that contract was usurious.

[1] *Moon vs. The Union Mutual Life Insurance Company*, 3 Central Law Journal, 345.

"I find," says he, "these three mortgages are usurious. This result I reach upon the special circumstances of this case—placing it largely upon the ground that the requiring of such a large and extraordinary amount of life insurance, not only upon the life of the borrower, but upon that of others, as a condition of making the loan, is a direct loss to the borrower and in violation of the purpose and policy of the usury laws."

It is stated, in the report of the case, that in the accounts between the parties, the three per cent. commission was disallowed by the court. I am not sure that I would not have gone a little further in that case than Judge DILLON did. If there was any proof in this case, if it could be fairly inferred from all the evidence that it was one of the conditions of the loan imposed, directly or indirectly, by the lender, that the borrower should pay commissions, the contract would then be usurious. It should then be fairly regarded as a mere device to evade the statutes upon usury.

But as already stated, there is no evidence to that effect. It is the naked case of a lending of $30,000, without any obligation, understanding or contract, on the part of the lender, that the borrower was to pay commissions to Seelye. The payment of commissions to him was the act of the borrower alone, uninfluenced by any suggestion from the lender. My conclusion, therefore, is, that the master's report should be sustained, and a decree rendered for the complainant.

ARTHUR L. WRIGHT *et al.*, ASSIGNEES, vs. FIRST NATIONAL BANK OF GREENSBURG.

CIRCUIT COURT—DISTRICT OF INDIANA—JULY, 1878.

1. USURIOUS INTEREST—RIGHT OF ASSIGNEE TO SUE FOR.—An assignee in bankruptcy is the "legal representative" of the borrower within the meaning of the 30th Section of the National Banking Act, and as such can maintain an action to recover back usurious interest paid, as provided for by said act.

2. The right of action given by said section is a "claim" or "debt" which passes to the assignee.

3. Though such action is to recover a penalty, it is distinguishable from actions for damages growing out of mere torts to the bankrupt's person.

Coffroth & Stewart; Baker, Hord & Hendricks, and *Dye & Harris*, for plaintiffs.

McDonald & Butler, for defendant.

GRESHAM, J.—The declaration alleges that the defendant has reserved, taken and received usurious interest from the bankrupts. The action is brought to recover double the amount of interest thus paid, and is based upon the 30th section of the National Banking Act, which reads as follows:

"Every association organized under this act may take, receive, reserve and charge on any loan * * * interest, at the rate allowed by the laws of the state or territory where the bank is located, and no more; except that where by the laws of any state a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized in any such state, under this act. And when no rate is fixed by the laws of the state

or territory, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum. * * * And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid, from the association taking or receiving the same."[1]

The defendant demurs to the declaration, on the ground that the plaintiffs, as assignees in bankruptcy, have no legal capacity to prosecute the action. This is the only question presented by the demurrer.

The right of action given by this section is penal: *Tiffany vs. National Bank*, 18 Wallace, 409.

In the absence of a statute authorizing it, a right to a penalty cannot be assigned, nor, a right of action for a tort. *Gardiner vs. Adams*, 12 Wendell, 297. The defendant exacted and received usurious interest. Had the bankrupts remained solvent, they might have prosecuted an action for double the amount of interest paid. Unless the right of action has been barred, it yet exists, either in the bankrupts or their assignees. It is insisted that because the bankrupts could not have sold or transferred the right of action, if they had remained solvent, that, therefore, their assignees have no legal capacity to prosecute the suit. *Tiffany vs. The National Bank, supra*, was an action by a trustee, to recover the penalty given by the statute. The plaintiff recovered, but his capacity to maintain the action seems not to have been directly raised. In the case of *Crocker, Assignee, vs. First National Bank*, 4 Dillon, 358, the precise question raised by this demurrer was considered, and it was held by DILLON, Judge, that the assignee was the "legal representative" of the borrower within the meaning of the banking

[1] 13 United States Statutes at Large, page 108.

act, and as such could maintain the suit whether the right of action vested in the assignee under the bankrupt law or not.

In *Tiffany vs. Boatman's Institution*, 18 Wallace, 375, the assignee in bankruptcy was allowed to recover usurious interest, which had been paid by the bankrupt in violation of the statutes of Missouri.

In *Meech vs. Stoner*, 19 New York, 26, it was held that an assignee could maintain an action to recover money lost at faro, under a statute which gave the right of action to the loser. See, also, *Carter vs. Abbott*, 1 Barnewall and Cresswell, 444, and *Gray vs. Bennett*, 3 Metcalf, 522. In this last case, the assignee of the insolvent debtor was allowed to recover three-fold the amount of usurious interest paid to the defendant, that being the amount allowed by the Massachusetts statutes. This is a well-considered case.

In *Bromley, Assignee, vs. Smith*, 2 Bissell, 511, it was held by MILLER, District Judge, that the assignee could not maintain an action to recover the penalty given by the statute. And it seems to be conceded that in the case of *Barnett vs. Muncie National Bank*, in the Circuit Court of the United States for the Southern District of Ohio, a similar ruling was made by Justice SWAYNE, and the late Circuit Judge, EMMONS, in an oral, but unreported opinion. To the same effect is *Nichols vs. Bellows*, 22 Vermont, 581.

The bankrupt act[1] vests in the assignee for the creditors the entire estate of the debtor—everything of beneficial interest passes by the deed of assignment, except certain necessary exemptions which are intended to protect the bankrupt and his family from temporary distress.

It is true that rights of action for torts to the debtor's person, such as assault and battery, false imprisonment, ma-

[1] Revised Statutes, §§ 5,044, 5,045, 5,046 and 5,047.

licious prosecution, libel and slander, do not pass to the assignee. While it must be conceded that under the decision of the Supreme Court, this is an action, in part at least, to recover a penalty, yet there are reasons why claims of this kind should vest in the assignee which do not apply to rights of action for damages growing out of mere torts to the debtor's person. In the right of action given by the banking act the bank exacts and receives from the borrower more than the law allows as a fair compensation for the use of its money. In this illegal way, the bank gets into its possession part of the borrower's estate, money which should go to the creditors of the bankrupt borrower. This demand and receipt of illegal interest by the bank may have materially contributed to the bankrupt's downfall. The recovery allowed by the 30th section of the act is "in any action of debt."

If the assignees are not the "legal representatives" of the bankrupt within the meaning of the 30th section of the banking act, and the right of action never passed to them under the bankrupt act, then, unless the suit has been barred, the bankrupts may sue for and recover the money for their own benefit, when, perhaps, they have already received their full exemptions and have been discharged from all their obligations.

As between the bankrupts and their creditors, this would be unjust, and such a result is not easily reconciled with the chief object of the bankrupt law, which is the equal distribution of the insolvent debtor's entire estate amongst all his creditors.

In *Gray vs. Bennett*, *supra*, "it is very clear," say the court, "that if a creditor of the insolvent debtor should attempt to prove a note under the commission, it would be the duty of the assignee to reduce the amount, if usurious interest had been taken on it, or was reserved in it, and in

this manner the creditors would be benefited by such reduction. Why should they not have the advantage of it where the debtor was paid the usurious demand, prior to the insolvency and within the time limited by the statute for recovering it?"

I think the assignees are the "legal representatives" of the bankrupts within the meaning of the 30th section of the banking act; and that the right of action given by that section is a "claim" or "debt" which passed to the assignees under the provisions of the bankrupt law.

Demurrer overruled.

DAVID J. TYSEN, JR. vs. THE WABASH RAILWAY COMPANY *et al.*

CIRCUIT COURT—SOUTHERN DISTRICT OF ILLINOIS, AND DISTRICT OF INDIANA—JULY, 1878.

IN EQUITY.

1. FORECLOSURE—RECEIVER.—The appointment of a receiver pending proceedings for foreclosure, is a matter resting in the sound discretion of the court.

2. DEFAULT OF PAYMENT.—The mere fact that there has been a default in the payment of the debt, is no ground for the appointment of a receiver, unless there be a stipulation in the mortgage that the mortgagee shall have the rents.

3. RAILROAD—APPOINTMENT OF RECEIVER—WHEN MADE.—The court will not, in deference to the mere technical rights of a very small minority of bondholders of a railroad corporation, appoint a receiver where it appears that such action would imperil, if not destroy, the interests of others whose rights are entitled to equal consideration.

4. Discretionary Power — All Interests to be Considered — Funding Scheme.—In the exercise of the broad discretion which the court has, in the matter of appointing a receiver, it will not make such appointment if it perceives that a much greater injury would result to those interested in the railroad, than by leaving the property in the hands then holding it, especially, when it appears that the large majority of the stockholders and bondholders favor a funding plan then being negotiated.

This was a suit to foreclose mortgages on the defendant railroad.

Motion by complainant to appoint a receiver pending litigation.

The facts of the case are stated in the opinion.

Charles W. Hassler, James Matthews, Robert E. Williams and *S. A. Huff*, for complainant.

W. Swayne, Henry S. Greene and *John N. Jewett*, for defendants.

Harlan, J. (orally)—The lines of railway now controlled by the Wabash Railway Company were formerly owned by different corporations, which respectively executed mortgages for large amounts at different times. It may be well to recall the history of those mortgages, and some of the material facts connected with the organization at a subsequent date, of the present company. The different corporations referred to, executed first mortgages to secure the following amounts of bonds: In 1853, the Toledo and Illinois Railway Company, owning 75½ miles of railway in Ohio, executed a first mortgage for $900,000. In the same year the Lake Erie, Wabash and St. Louis Railroad Company, owning 116½ miles of railway in Indiana, executed a first mortgage for $2,500,000. In 1862, the Illinois and Southern Iowa Railroad Company, owning 29½ miles of railway in Illinois, executed a first mortgage for $300,000. In 1863, the Great Western Rail-

way Company of 1859, owning 180 $\frac{3}{10}$ miles of railway in Illinois, executed a first mortgage of $2,500,000. In 1865, the Quincy and Toledo Railroad Company, owning 33 $\frac{6}{10}$ miles of railway in Illinois, executed a first mortgage for $500,000. In 1869, the Decatur and St. Louis Railroad Company owning 108 $\frac{1}{2}$ miles of railway in Illinois, executed a first mortgage of $2,700,000, making an aggregate of first mortgages on these different roads of $9,400,000.

Second mortgages were executed as follows: In 1858, the Toledo and Wabash Railroad Company, owning 75 $\frac{1}{2}$ miles of railway in Ohio, gave a second mortgage of $1,000,000. In the same year the Wabash and Western Railroad Company, owning 166 $\frac{1}{10}$ miles of railway in Indiana, gave a second mortgage of $1,500,000. In 1865, the Great Western Railroad Company of 1859, owning 180 $\frac{3}{10}$ miles of railroad in Illinois, gave a second mortgage of $2,500,000, making an aggregate of second mortgages of $5,000,000.

In 1867, the Toledo, Wabash and Western Railroad Company, a corporation formed by consolidation, and then owning all the lines of railway now operated by the Wabash Railway Company, except the St. Louis division, executed what is styled in the record the "Consolidated Mortgage." In 1873, the consolidated Toledo, Wabash and Western Railroad Company, then owning and operating the entire line of railway now owned and operated by the Wabash Railway Company, executed what is known as the "Gold-bond Mortgage."

In February, 1875, the Metropolitan Bank of New York, and others, holding bonds secured by the "Gold-bond Mortgage," filed a bill of complaint in the Court of Common Pleas in Lucas County, Ohio, seeking a foreclosure and sale upon the ground of default in paying interest.

A receiver was appointed, and by him the line of railway was operated for nearly two years. Similar proceedings were had in the courts of other states as to the portions of the

road in those states. In June, 1876, the property covered by the "Gold-bond Mortgage" — which was the last one — was sold under a decree at public auction, when John W. Ellis and others became the purchasers at $2,500,000. That sale and purchase were subject, by agreement, to all mortgages prior in time to the "Gold-bond Mortgage," the priority and continuance of all prior mortgage liens being expressly reserved in the decree and declared unaffected by the sale. So that, that sale was exclusively for the interest covered by the "Gold-bond Mortgage." The purchase by Ellis and others was made in pursuance of an understanding previously had among those interested in the property, but whose rights were subordinate to those created by the first mortgages. Had the foreclosure taken place under the prior mortgages, or any of them, or if a forced sale had then been ordered for cash, it is entirely clear, in view of the condition of the country at that time, and in view especially of the depressed value of railroad property, that the rights of all the parties would have been seriously endangered, if not ruinously sacrificed. Hence the arrangement to sell under the gold mortgage alone. One of the avowed purposes of that arrangement was, if possible, to save something for the stockholders, who, as a general rule, in railroad foreclosures lose all. To that end the purchasing committee organized a new company with a capital of $16,000,000 — that is, the present Wabash Railway Company. The stockholders of the old company were invited to put up $1,600,000 with which to buy the entire capital stock of the new company, receiving new stock at the rate of ten for one on the subscription. Of the 160,000 shares of new stock, all were subscribed for by the old stockholders, except 800 shares, and that amount was subsequently taken by the bondholders' committee in accordance with the plan proposed.

After the purchase, the new company, on the 13th of Jan-

uary, 1877, executed what is called the Seney mortgage upon the road for $1,026,555.22 to secure certain indebtedness which the new company agreed to pay at the time, and as a condition of its purchase, and also, perhaps, to raise funds needed by the new organization for the operation of the road.

In January, 1877, and after the execution of the Seney mortgage, a funding scheme was proposed to the bondholders for the purpose, as the company declared, of restoring the property, and placing it on a substantial and interest-paying basis. The main feature of this scheme was to give the holders of past due and unpaid coupons of prior mortgages and coupons maturing as far ahead as November 1, 1878, scrip certificates, to run until the maturity of the bonds from which the coupons were detached, bearing seven per cent. interest payable annually, the coupons to be returned to the holders whenever there was any default in paying the interest on the certificates; such arrangement in nowise to impair the liens on the portions of the road by which the respective bonds and coupons were secured. The holders of scrip certificates were given the option of funding the same into bonds of $500 or $1,000 each, with coupons at seven per cent. semi-annually, maturing in 1907, when the consolidated bonds mature, and to be called the funded debt bonds. In order to provide for the extinguishment of the funded bonds and the scrip certificates, the company, as a part of the funding scheme, proposed to set apart from its earnings after the year 1882, annually the sum of $100,000, to be invested in the purchase and the cancellation of the scrip certificates or of the funded bonds, at not exceeding the par value thereof; those pertaining to the first mortgages to be retired first, the second mortgages second, and the consolidated mortgage last.

The company, in its funding proposition, said: "The directors of the Wabash Railway Company, having in mind

the fact that all the bonds cover only portions of the road, none being secured by the entire property, have endeavored to give due consideration to each class, and to treat each with the utmost liberality that the prospective earnings of the road will admit of, and at the same time keep it in a condition to enable it to earn sufficient revenue to accomplish the result proposed."

Modifications of the funding scheme were subsequently proposed, but these modifications need not be noticed here, since they do not materially affect the determination of the present motion. On the 30th of April, 1878, the funding scheme had been expressly agreed to, by over 96 per cent. of the bondholders holding under first mortgages, by more than 84 per cent. of those holding under second mortgages, and by 70 per cent. of those holding under the consolidated mortgages. These figures are as nearly accurate as I have been able to make them. It is thus seen that over 80 per cent. of all the bondholders have agreed to this scheme. Those who have indicated their dissent in express terms are less than one per cent. of all the bondholders. The holders of nearly $100,000 of bonds, who declined to assent to the funding scheme, have, notwithstanding, filed affidavits opposing the present suit and motion. The remaining bondholders are silent so far as the record shows. Without notice to, or demand upon the trustees, this suit was instituted by Tysen, he holding some of the second mortgage and consolidated or third mortgage bonds, by comparatively recent purchases made in the New York market, for the purpose of having the mortgage foreclosed, and the road sold to pay past due interest and the mortgage debt. He sues on behalf of himself and all others in community of interest with him, and who may unite in this proceeding. Some of the bondholders have united with him, the aggregate of bonds represented on that side of the case being a little over $100,000.

The matter now before the court for its determination is the application of complainant, and those standing with him, for the appointment of a receiver, pending the proceedings for foreclosure. That motion is opposed, although the right of complainant, and those united with him in these proceedings to a decree of foreclosure, whenever the case is ripe for such a decree, is conceded.

At the threshold of this contest, the inquiry arises as to the nature and extent of the discretion which the court may exercise in determining applications for a receiver of a railroad. Judge STORY, in his Equity Jurisprudence, second volume, section 831, says: "The appointment of a receiver is a matter resting in the sound discretion of the court." In High on Receivers, section 365, the author says:

"While the jurisdiction of equity over railway corporations, as enlarged by the statutes and practice of the various states, is based upon and exercised in accordance with substantially the same principles which govern its jurisdiction over other corporations, the courts are more reluctant to lend their extraordinary aid by the appointment of receivers over railways than in almost any other class of corporate bodies. The importance of these corporations as being quasi-public bodies, and the peculiar nature of their property and franchises, sufficiently explain the reluctance with which equity interferes with their management, and, in general, the courts proceed with extreme caution in placing them in the hands of receivers. And wherever the ordinary remedies provided by law are open to the creditors of such corporations for the enforcement of their demands, the appointment and continuance of a receiver in office for a long period of years, is the exercise of a judicial power which can only be justified by the pressure of an absolute necessity."

In "Jones on Mortgages," volume 2, section 1,516, the author says:

"The mere fact that there has been a default in the payment of the debt is no ground for the appointment of a receiver, unless there be a stipulation in the mortgage that the mortgagee shall have the rents."

There is no such stipulation in these mortgages.

The Supreme Court of the United States, in the case of *The Railroad Company vs. Soutter*, 2 Wallace, 523, says:

"Sebre Howard objects to the discharge of a receiver, because he has a judgment of $16,000 against the LaCrosse and Milwaukee Railroad Company, which he claims to be a lien on the road; and as the present receiver has also been appointed receiver in his suit, he claims that his debt must first be paid before he can be discharged. The idea of appointing or continuing a receiver for the purpose of taking ninety-five miles of railroad from its lawful owners, which is earning a gross revenue of $800,000 per annum, to enforce the payment of a judgment of $16,000, the lien of which is seriously controverted, is so repugnant to all our ideas of judicial proceedings that we cannot argue the question. If Mr. Howard has a valid judgment, the usual modes of enforcing that judgment are open to him, both at law and in chancery, but the extraordinary proceeding of taking millions of dollars' worth of property—of such peculiar character as railroad property is—from its rightful possessors, as one of the usual means of collecting such a comparatively small debt, can find no countenance in this court."

Further on in the same opinion, page 524, the court says:

"In reference to all these parties, we remark again that the court deprives them of none of their rights to proceed in the courts in the ordinary mode to collect their debts, and that the appointment of receivers by a court to manage the affairs of a long line of railroad, continued through five or six years, is one of those judicial powers the exercise of which can only be justified by the pressure of an absolute necessity."

Upon examination of these and other authorities cited, it will be found that the action of the courts has depended largely upon the peculiar circumstances of each case. In no instance has the action of the court, in appointing or refusing to appoint a receiver, rested exclusively upon the technical, legal rights of the parties.

The rule deducible from the cases, and which commends itself to my judgment as sound, especially in suits to foreclose railroad mortgages, is well stated in the case of *Vose*

vs. Reed, 1 Wood, 650, where this language is used by Mr. Justice BRADLEY:

"The next question is, whether the court will appoint a receiver. This is a matter always in the discretion of the court, but as a general rule a receiver will be appointed for the purpose of protecting the fund when the complainant has an equitable interest in the subject, and the defendant having possession of the property is wasting it, or removing it out of the jurisdiction of the court. But all the circumstances of the case are to be taken into consideration, and if the case be such that a greater injury would ensue from the appointment of a receiver than from leaving the property in the hands now holding it, or if any other considerations of propriety or convenience render the appointment of a receiver improper or inexpedient, none will be appointed."

Applying these principles to the case in hand, what do we find? On the side of the complainant, it appears that he is the owner of certain bonds, for the security of which mortgages were executed. In the payment of interest upon those bonds there has been a default. The present managers in execution of the funding scheme have been paying interest to those bondholders who have given their assent to that scheme, and decline to pay interest to complainant and those standing with him, who refuse to become parties to the funding scheme. More than that, the present managers are not applying all of the net revenue arising from the operation of the road to the payment of interest in the order of priority of mortgages, but are applying a portion to the discharge of obligations created by the Seney mortgage, which is the last mortgage upon the property. Complainant claims that this is a misapplication of the income, and of itself, in connection with the present supposed inadequacy of the security for all the bonds, would make it the duty of the court to take charge of the property by a receiver. Tysen and his colleagues insist that the duty of the managers is to keep down the interest on the first mortgage to the extent of the entire net income of the company; since

that course, they contend, will increase the value of the subsequent incumbrances; that the company have no right, as a condition precedent to the performance of their duty, according to the legal rights of the parties, to require the complainant and his colleagues to submit to a funding scheme which they do not approve.

Upon the other hand, we find the vast majority of the bondholders, under all the mortgages, insisting that the funding scheme is the best arrangement for all concerned, and that under that arrangement, faithfully and honestly carried out, the rights of all parties will be best secured. The company invites complainant and those now standing with him to join in that scheme with the large majority of those who have the same character of rights with them. That, that scheme is being honestly adhered to, and will be carried out in good faith, the evidence does not permit me to doubt. I will not stop to state in detail all the reasons arising out of the evidence for the conclusion I have reached. But, I cannot doubt that the appointment of a receiver, at this time, would not only break up this line of railway into its original fragments, but would overturn the funding scheme, thereby destroying a large present income for the great majority of bondholders. It would, in addition, work the financial ruin of all the interests involved in this railroad enterprise, subordinate to the first mortgage bondholders, including the interests of the complainant, and those united with him in this suit. Those who will certainly suffer, and who will suffer first, will be the stockholders of the old company, and who became the stockholders in this new organization by advancing $1,600,000. None of the bondholders who were such when that $1,600,000 was advanced by the stockholders, are here actively seeking the appointment of a receiver.

Some of those who are conspicuously moving in that

direction became, according to their evidence, the owners of bonds quite recently, and as we may infer from the evidence, for merely speculative purposes. The present company did not get possession of the property until January 1, 1877. It has not yet had a fair chance to test the question, whether this vast railroad enterprise in its charge, may not be saved for the benefit of all concerned in its success. It did not fairly get to work for some months after January 1, 1877, and during that time they had much to contend with. Such is the testimony of its officers. Nevertheless, we find that while the net revenue from the business of 1875 is computed at $660,385.21, and from the business of 1876, at $984,646.-73, such revenue from the business of 1877 is computed at $1,384,094.37. During the first four months of 1878, the increase in the net revenue as compared with the net revenue of the corresponding four months of 1877, is computed at $156,897.99. The same increase, if it continue throughout the year, will give a net revenue in 1878 of $2,021,686.33. These are the computations of the treasurer of the company, a witness accredited to the court by both parties, and they seem to be fairly made. That officer says:

"That, in pursuance of said agreement of 1876, large amounts of money were paid for the stock of the new company, a large sum expended in organizing and establishing a thorough management, and improvement of the property and increase of equipment; that every possible effort has been made to increase the earnings and decrease the expenses, and to increase its capacity; that the present company did not get possession of the property till January 1, 1877, and did not get fairly to work for three or four months after, and then had much to contend with in heavy storms of snow, and the strikes, which diminished earnings in the months when they are never large, say the first three or four months of the year. They are known among railroad men as unprofitable months usually. But after four or five months had elapsed the earnings began to increase and expenses to diminish, and from thence hitherto have so continued. That the net earnings, over and above operating and renewal expenses, are so steadily increasing that there is the best prospect that said road will, during the current year, be able to

pay all its current interest, and also that the company will be able to pay all the suspended indebtedness under the funding scheme. That said funding scheme has already saved millions of dollars of capital, *bona fide* invested in the road, from utter cancellation; and that all classes of the securities of said road have been enhanced in value thereby."

Under such circumstances, and with a probability, recognized by sagacious men, that the country will soon pass from the era of hard times into an era of general prosperity for all, including those holding railroad securities, the court cannot, in deference to the mere technical rights of a very small minority of bondholders, lay its hand upon a railroad, over six hundred miles in length, running through three great states, and thereby imperil, if not destroy, the interests of others whose rights are entitled to equal consideration with those of the complainant and his colleagues. If the present management of the road were guilty of any fraud or dishonest practices in their control of this property, I should feel differently. While there are differences between them and some of the bondholders, as to certain matters connected with the discharge of the company's obligations, those differences do not involve the integrity of those operating the railroad. The court is disposed to recognize the absolute necessity of large discretion in the management of such vast property, and in the distribution of the net income arising therefrom, and it is unwilling, for the present at least, to make honest differences as to such matters, the basis for its interference by the appointment of a receiver. It will leave the parties to the ordinary remedies for the enforcement of their rights. Let the complainant proceed with the foreclosure suit, and take a decree for sale whenever it is proper to do so under the law and practice of this court. In the exercise of the broad discretion which the court has in the matter of appointing a receiver, it will not make such appointment in this case, under the present showing, for the

reason that a much greater injury would result from so doing, to all interested in this railroad, including even the complainant and his colleagues, than by leaving the property in the hands now holding it pending the foreclosure suit.

The motion for the appointment of a receiver is denied, and counsel will prepare the necessary orders.

UNITED STATES vs. DE WITT C. FARRELL *et al.*

CIRCUIT COURT — NORTHERN DISTRICT OF ILLINOIS — JULY, 1878.

1. INTERNAL REVENUE — DESTRUCTION OF SPIRITS BY FIRE — TAXES THEREON.—The fact that distilled spirits placed in a distillery warehouse were destroyed by fire, because of the absence of the Government storekeeper from the warehouse, does not release the bondsmen from liability for the amount of the taxes which were due on the spirits. The Government cannot be made a loser by a neglect of duty by an officer.

2. WHEN TAX ON DISTILLED SPIRITS ATTACHES. — The liability of a distiller for the tax on distilled spirits attaches so soon as the spirits are produced; and if he places them in a warehouse, giving bond for the payment of the tax on their removal and within one year from the date of the bond, and the warehouse and spirits are destroyed without any negligence on his part, this does not release him from liability for payment of the tax.

3. A destruction by fire is a "removal" within the meaning of the statute and the bond.

Mark Bangs, U. S. District Attorney, for the United States.

McCagg, Culver & Butler and *S. D. Puterbaugh*, for defendants.

BLODGETT, J.—This is a suit upon a distiller's warehousing bond, dated June 13, 1870, given by the defendant, Farrell, as principal, and signed by the other defendants, as sureties, in the penal sum of $33,000, conditioned for the payment by Mr. Farrell, as principal, to the Collector of Internal Revenue of the Fifth Collection District of this state, of the tax on 449 barrels of distilled spirits, containing $32{,}184\frac{89}{100}$ gallons of proof spirits, which were entered for deposit in the distillery warehouse attached to Mr. Farrell's distillery in Peoria in said district, before said spirits could be removed from said warehouse, and within one year from the date of said bond.

It is admitted that on the 27th day of July, next after the spirits were deposited in the warehouse and the bond given, a fire broke out in a building not connected with the Farrell distillery or warehouse, by which Farrell's distillery and warehouse took fire, and the same were wholly destroyed with the contents, including the spirits described in the bond, without any negligence or carelessness on the part of Farrell or those in charge of the distillery. It is also shown by the proof, and not disputed, that the warehouse in question was in charge of the Government storekeeper, who had the keys thereof, and that he was not present at the time the fire broke out, and for some time thereafter. And the proof tends to show that if he had been so present at the time it became evident that the distillery premises must burn, a portion, if not all, the spirits in the warehouse might have been saved, there being at the time in the warehouse about 2,000 barrels of spirits, and the spirits in controversy only amounting to 449 barrels.

The defendants deny their liability for the tax upon the facts shown.

The first point insisted upon is, that the loss occurred by reason of the absence of the storekeeper from the warehouse

at the time that the fire broke out, and until it was too late to remove the spirits therefrom. The fire occurred about noon, and the proof shows that the storekeeper had gone to his dinner, and the distillery was not then in operation, and his constant presence was not needed to superintend the operation of the distillery. I do not understand that any law or regulation requires the constant presence of the storekeeper at the warehouse and distillery when the distillery is not in operation; but even if it did, the rule is well settled that the Government cannot be made a loser by the neglect of duty by an officer.

The defendants in this case claim, however, that the United States Supreme Court has, in the case of *Clinkenbeard vs. United States*,[1] held that the failure of an officer to perform his duty releases the distiller. An examination of that case shows, however, that that was a case where the United States itself, or rather the department itself, was at fault, and not the officer of the department, in which I think there is a clear distinction. The operations of the distillery were suspended in that case for a number of days by reason of the failure of the treasury department to appoint a storekeeper; and the suit was brought against the distillery for the recovery of the amount of tax which the distillery should have paid according to its capacity, or, in other words, for its capacity tax. And the Supreme Court simply held that during the time the operations of the distillery were suspended for the want of a storekeeper the capacity tax should not be charged against the distillery. The case is clearly placed upon the neglect of the Government, and not upon the neglect of a subordinate officer of the Government to perform his duty; that the distillery was not legally in condition to

[1] 21 Wallace, 65.

legally run during the time that there was no storekeeper, therefore there was no earning of the capacity tax.

But the main point insisted upon in the argument is, that the distiller is not liable on this bond until he asks and obtains a permit to remove the spirits from the warehouse; that the act of paying the tax and removal must be simultaneous.

It is sufficient to say, that I do not concur in this view of the law. Section 3,248 provides that the tax shall attach to distilled spirits as soon as the same is in existence as such; that is, the distiller becomes liable for the tax as soon as the spirits are produced; but by the warehousing system the distiller is allowed one year in which to pay the tax, or such time as he chooses within one year, by depositing the spirits in a warehouse, and giving a bond. He is a debtor to the Government to the amount of the tax as soon as the wines are produced, but upon certain conditions, is allowed time for making payments.

Sections 3,287, 3,293 and 3,294, when taken together, clearly show that the warehousing bond is taken solely for the purpose of securing the payment of the tax at the convenience of the distiller within one year. This view is further sustained by the provisions of law which fix the tax to be paid by the amount of spirits which are gauged into the warehouse, and not by the amount which are gauged out. If the tax was not fixed until the removal, that would be the time at which to gauge the spirits, and determine the amount of the tax; but instead of that, it is the amount gauged into the warehouse, and the amount which is at that time marked upon the barrels, which determines the amount of tax to be paid. The letter of the bond, too, provides for the payment of the tax on a fixed and certain quantity of spirits before such spirits shall be removed from such warehouse, and within one year from the date of the bond. By the

terms of the bond the distiller must pay the tax on the removal of the spirits, it matters not whether the removal is caused by their evaporation or combustion from fire, or by the deliberate act of the distiller; in either case they are removed, and the condition of the bond is broken. This may seem a harsh rule but it is the only guide the court has to go by. The court cannot make the contract, but must construe and enforce that which is made by the parties.

This rule is clearly laid down in *The United States vs. Keehler*, 9 Wallace, 83; *United States vs. Prescott*, 3 Howard, 578, and *United States vs. Dashiell*, 4 Wallace, 182. The view I take is much strengthened by the provisions of Section 3,221 of the Revised Statutes which reads as follows:

SEC. 3,221. The Secretary of the Treasury, upon the production to him of satisfactory proof of the actual destruction by accidental fire or other casualty, and without any fraud, collusion, or negligence of the owner thereof, of any distilled spirits, while the same remain in the custody of any officer of internal revenue in any distillery warehouse, or bonded warehouse of the United States, and before the tax thereon has been paid, may abate the amount of internal taxes accruing thereon, and may cancel any warehouse bond, or enter satisfaction thereon in whole or in part, as the case may be. And if such taxes have been collected since the destruction of said spirits, the said Secretary shall refund the same to the owners thereof out of any moneys in the Treasury not otherwise appropriated.

Now the question naturally occurs here: Why clothe the Secretary of the Treasury with the power to abate the tax if none was due? Why give the Secretary of the Treasury the power to remit a claim against a person, if the Government has no claim against him? The whole theory upon which that statute is based is to my mind clear that the tax was due upon the production of the spirits, and that, as an equitable consideration, the Secretary of the Treasury may, in his discretion, abate the tax, if he sees fit.

The questions involved in this case I admit are not en-

tirely free from doubt, and I have not the light of much direct authority upon the question. No case, I think, has ever been decided by the Supreme Court of the United States directly involving the question here raised. There is the case of *Insurance Companies vs. Thompson*, 95 United States, 547, where it seems to me that the plain intimation of the court is in favor of the view of the law which I am now taking. In that case certain wines were placed in a bonded warehouse connected with the distillery; the parties interested in those wines insured them, and they not only insured the value of the wines themselves but the Government tax thereon; they were destroyed, as the wines in question were, by an accidental fire, and suit was brought upon the warehousing bond and the amount of tax recovered on the warehousing bond. After the recovery of the amount of the tax and the payment of the judgment, as I infer from the record in the report, the parties who had obtained insurance, the owners of the wine and the parties interested, brought suit against the insurance company; and it was contended in that case that the amount of the Government tax was not an insurable interest; the court below held that it was and rendered judgment, and the case was taken to the Supreme Court and affirmed. So that the argument from that case is that the party placing wines in a Government warehouse or in a bonded warehouse, has an insurable interest, to the amount of the cost or value of the wines and the Government tax, and can, therefore, insure for that amount. I know the fallacy that courts frequently are led into by following a case where the direct question is not decided, that is before the court, yet it seems to me that in the absence of authority, some force, at least, ought to be given to that case; and, though the case is not entirely free from doubt, yet my conclusion is, that the defendant was liable for the tax on these spirits from the time they were produced.

There will be a finding for the plaintiff.

This opinion was affirmed by the United States Supreme Court, in 99 United States, 221. [*Reporter.*

FREDERICK A. BROAD vs. PETER W. DEUSTER.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—AUGUST, 1878.

1. LIBEL—WORDS ACTIONABLE PER SE—ADULTERY.—A false publication concerning one that there are "suits pending against him to the effect that he has put himself in unlawful relations with the wives of other men" is libellous *per se.*

2. INNUENDO.—The words being actionable *per se*, an innuendo is not needed to connect them with any extrinsic facts.

3. SPECIAL DAMAGE—PLEADING.—Where a publication is libellous *per se*, special damage to the business of the person may be shown, though the words were not published concerning that business; and it is not necessary to allege the names of the customers who have ceased to do business with the plaintiff in consequence of the publication.

This was an action for libel. The amended complaint was demurred to. It contained two counts. The first charged that the plaintiff was a citizen of Illinois and was a bookseller and stationer doing business at Freeport in that state; that in August, 1873, the defendant was the publisher and proprietor of a newspaper published in the German language at the city of Milwaukee; that on the 9th day of August, 1873, the defendant with malice and wrongfully, published in said newspaper of and concerning the plaintiff, certain

words which were set out, in the German language in the pleading, followed by a translation, which is as follows:

"Freeport, Ill., 9 Aug. Here prevails some excitement on account of a libel suit which one of our county officers, F. A. Broad, has instituted against Messrs. Wagner, Senior and Junior, publishers of the *German Anzeiger*. The suit is for $25,000 damages. Said paper had criticised the conduct of Broad as member of the Grand Jury, and Broad believes that what he calls his honor can only be patched up by means of $25,000. Against Broad, however, are also suits pending to the effect that he has put himself in unlawful relations with the wives of other men."

It was then alleged that a large number of persons of German birth in the county of Stephenson, Illinois, were subscribers for this newspaper, and read the article therein, alleged to be libellous; that it was also read by a great number of persons in Wisconsin, Illinois, Iowa, and Minnesota; that afterwards the plaintiff called at the office of the proprietor of the paper, and demanded of the defendant the name of the correspondent who had communicated the article, which he refused to give, and at the same time stated that the article was true, and invited the plaintiff to bring a suit against him for damages. It was alleged that the words so published were false, and that by reason of the publication thereof the plaintiff had sustained damages in the sum of $15,000.

The second count was substantially like the first, except that it was alleged further, that by the publication of the words in question, the credit of the plaintiff as a merchant, and his standing and reputation in the community where he resided were greatly injured, and that he had lost and been deprived of gains and profits which would otherwise have accrued to him in his business, and damages were demanded.

J. W. Flanders, for plaintiff.

J. V. V. Platto, for defendant.

DYER, J.—With reference particularly to the first count, it is said, that it states no injury to the plaintiff's reputation, business or trade. It is true that the usual form of allegation in a pleading in such cases is, that by means of the publication, the plaintiff was injured in his reputation, to his damage, etc., where personal damages only are claimed. But though this precise form is not here followed, and though the allegation of damage in the first count is very general, I do not think it can be said that the pleading does not state a cause of action.

With reference to the second count, it is said, that injury to both reputation and to business is alleged, and that where injury to reputation is charged it should be averred that the plaintiff was of good reputation. But in cases where the words charged do not of necessity bear some relation to a party's employment or profession or official capacity, it is not necessary to aver that he was of good reputation, though it is usually alleged. The law presumes the plaintiff to have possessed a good reputation until the contrary is shown.

It is contended further, that the alleged publication is not libellous *per se*, and that the necessary innuendo is wanting, and so, that the complaint throughout is fatally defective. It is not always easy to determine what is the proper use of innuendoes in a complaint for defamation under the code system of pleading. It has been well remarked by a writer on the subject, that by the code, some of the most serious difficulties which, under the former practice, defendants had to encounter in such an action have been removed, "but by so much as the defendant's path has been illuminated, by so much the course of the plaintiff has been thrown in the

shadow." I find the following rules laid down on the subject by a code writer, and they seem to be sound.

"*First*—Where the words are not libellous in themselves but are made so by some extrinsic matter alleged by way of inducement, innuendoes are requisite to connect the words charged, with the extrinsic facts.

"*Second*—The same rule applies in occasional cases, where the words are made libellous by reference to some extrinsic matter not necessary to be pleaded by way of allegation. In such case the extrinsic fact should be suggested by an innuendo.

"*Third*—A pleader will be allowed, where it is obviously convenient, to employ an innuendo by way of allegation of the import of the words charged, without going through the form of making a prefatory statement of the extrinsic facts."

In other cases than these, to show the meaning imputed to words libellous in themselves, innuendoes may be dispensed with.

The publication complained of, is, I think, clearly libellous. The argument of counsel for the defendant seemed to assume "that in order to constitute a libel, the publication must impute a crime, or charge something which if uttered verbally would have been actionable in itself as slander. But the distinction between slander and libel in this respect is well established; and it is settled that an action for libel may be sustained for words published which tend to bring the defendant into public contempt or ridicule, even though the same words spoken, would not have been actionable."[1] The words alleged to have been published being actionable *per se*, an innuendo is not needed to connect them with any extrinsic facts.

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[1] *Lansing vs. Carpenter et al.*, 9 Wisconsin, 540.

Further, with reference to the second cause of action, it is claimed that the publication in question does not touch the plaintiff in his trade or business as a merchant, and therefore he cannot demand damages for loss of business or credit. But where words published are libellous *per se*, I understand special as well as general damage may be shown. It is not claimed by the plaintiff that the publication complained of has particular relation to his business, but that in consequence of the alleged libel, he was injured in his general reputation and in his business. And it seems clear that the whole injury, if any, special as well as general, may be shown.

Finally, it is urged, that the names of customers, who it is alleged ceased to do business with the plaintiff in consequence of the publication, should be given. The omission of the pleading in this respect may render it obnoxious to a motion to make it more definite and certain, but it is not for such omission demurrable, the words published being libellous *per se*. Where a libel is not in itself actionable, and the action is sustainable merely in respect of special damages, such damages must be stated, and in such case it has been held that a general averment of loss of customers is not a sufficient allegation of special damage.

Demurrer overruled.

UNITED STATES vs. ONE COPPER STILL, ETC.

DISTRICT COURT—EASTERN DISTRICT OF WISCONSIN—SEPTEMBER, 1878.

1. REVENUE LAW—FORFEITURES—PERSONAL PROPERTY—OWNERSHIP.—Personal property situated upon distillery premises and used in the business of illicit distilling is subject to forfeiture by the Government, irrespective of its ownership.

2. SAME—KNOWLEDGE OF FRAUD.—Neither the owner of personal property, nor his mortgagee, though innocent of any knowledge of its fraudulent use, can maintain a claim thereto paramount to the rights of the United States, in proceedings for the condemnation of the same for use in illicit distillation.

3. TIME OF FORFEITURE.—Where a statute in direct terms denounces a forfeiture of property as a penalty, the forfeiture takes place at the time the offense is committed, and operates as a statutory transfer of the right of property to the Government.

This was an information against certain property described as one copper still, one copper column, one mixing tub, one dumping tub, one alcohol tub, and other property of a similar character, seized at the rectifying house of the South Side Re-distilling Company, on July 2, 1877.

The information alleged that the property was seized by the Collector of Internal Revenue for violation of the law by one Hatzfeld who was in possesion of the property and who had used the same in the illicit distillation of spirits; and that on July 7, 1877, the property was turned over to the Marshal, as authorized by law, and held by him as forfeited, and that the same was subject to forfeiture and was forfeited for the causes set forth, (the facts being fully stated.)

Hatzfeld failed to appear or to answer the information;

decree of condemnation passed, and there was a sale of the property, the proceeds of which were in the registry of the court.

On the 7th day of August, 1877, and previous to decree and sale, a mortgagee of part of the property, intervened by petition, claiming that prior to the seizure, one Delmanzo was the owner of a portion of said property and had mortgaged the same to one Reynolds, who had made a *bona fide* transfer of such mortgage to the petitioner, and that neither Reynolds nor the petitioner was a party to, or knew of any attempt to commit a fraud upon the revenue laws.

This petition having been filed before decree and sale, the court was asked by petitioner's counsel to then adjudicate their rights, but it was the view of the court that decree should be entered, and the sale proceed, and thereafter the rights of the parties should be passed upon, with the same force and effect as if adjudicated when the petition was filed.

The facts will appear more fully in the opinion.

G. W. Hazelton, U. S. District Attorney, for the United States.

Murphey & Goodwin, for petitioner.

DYER, J.—Considering the case precisely as it stood before condemnation and sale, what were and are the rights of the parties? The information charged violations of law by Hatzfeld, who was in possession of the property. By non-appearance and default, he confessed the allegations of the information. The property was therefore liable to forfeiture, and was forfeited to the United States, so far as he and his interests were concerned. The offenses producing the forfeiture were committed in the several months between November 1, 1876, and July 2, 1877. On the 10th of April, 1877, admitting the allegations of the petition to be true, Delmanzo

was the owner of a portion of the property used by Hatzfeld in the business, and on the premises, and on that day made the mortgage thereon, now claimed to be a lien paramount to the interest of the United States. Neither the petitioner, nor Reynolds the mortgagee, was a party to the alleged illicit manufacture of spirits, or had any knowledge thereof, but both were innocent parties holding the mortgage in good faith to secure a *bona fide* indebtedness.

Upon this state of facts, is the mortgage to be recognized as a lien paramount to the claim of the United States, and should the forfeiture and condemnation of the property be held subject to the mortgage interest of the intervenor?

The good faith of the mortgage being shown, it is claimed by the learned counsel for the intervenor, that the Government can only forfeit and condemn the interest of Hatzfeld in the property, and as he did not own the interest of the mortgagee, that interest is not and cannot be forfeited by reason of illegal transactions on the part of Hatzfeld.

Section 3,281 Revised Statutes provides, that "Every person who carries on the business of a distiller, without having given bond as required by law, or who engages in or carries on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or of any part thereof, shall, for every such offense, be fined * * * and imprisoned. * * * And all distilled spirits or wines, and all stills or other apparatus fit or intended to be used for the distillation * * * of spirits * * * owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or in any building, room, yard or inclosure connected therewith, and used with or constituting a part of the premises; and all the right, title and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title and interest therein of every person who knowingly has suf-

fered or permitted the business of a distiller to be there carried on, or who has connived at the same, and all personal property owned by or in possession of any person who has permitted or suffered any building, yard or inclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery, which shall be found in any such building, yard or inclosure, and all the right, title and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States."

By this section, a forfeiture is denounced, first of spirits, wines, stills and other apparatus *owned by the distiller*, wherever found; second, of all distilled spirits, wines and personal property found in the distillery, or in any building, room, yard or inclosure connected therewith, and used with or constituting a part of the premises; third, of all the right, title and interest of the distiller in the lot or tract of land on which such distillery is situated; fourth, all right, title and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or who has connived at the same; fifth, all personal property owned by or in the possession of any person who has permitted or suffered any building, yard or inclosure, or any part thereof, to be used for the purposes of ingress or egress to or from such distillery, which shall be found in any such building, yard or inclosure; and, sixth, all the right, title and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress.

Thus it will be seen, a distinction is made in some respects between real estate and personal property. As was said by Judge WOODRUFF in *United States vs. The Distillery at*

Spring Valley, 18 Internal Revenue Record, 61: "In this section, Congress seems to have anticipated a possible discussion, whether it was intended to forfeit property found upon the premises, or used for the purposes of distillation, not belonging to the distiller, and to have purposely been so explicit as to preclude inquiry into mere questions of title, and at the same time, in respect to *the real estate*, to protect one whose land, under lease or out of possession may, without his knowledge and consent, or perhaps even against his will, when he has no power to prevent, be used in or for the purposes of a distillery."

Further, in the same opinion it is said, that the second of the forfeitures enumerated, "is declared irrespective of ownership. It plainly includes property not owned by the distiller. All spirits, wines, stills and other apparatus owned by the distiller, had already been declared forfeited, whether found on the distillery premises or not. It would have been meaningless to declare again, that the same should be forfeited when found there. Spirits, etc., owned by the distiller are brought into distinct contrast with the other spirits, etc., named. The latter are only forfeited when found on the distillery premises; the former are forfeited wherever found."

Such is the construction that has been placed upon this statute, and in view of its plain provisions, no other, in my opinion, is sound. Now, applying the law, as so construed, to the present case, the following conclusions necessarily result. Taking the averments of the information as undenied, the alleged infractions of law were committed, both before and after the making of the mortgage in question. Where a statute in direct terms denounces a forfeiture of property as a penalty, the forfeiture takes place at the time the offense is committed, and operates as a statutory transfer of the right of property to the Government. *United States*

vs. 56 Barrels of Whiskey, 6 American Law Register, (N. S.) 32. And in the case just cited it was so held against persons who had in good faith purchased the property before the commencement of suit for condemnation. The property in question was therefore already forfeited to the United States when the mortgage was made. It was so forfeited as to both Hatzfeld and Delmanzo, because, as we have seen, the forfeiture of such property occurs irrespective of ownership. If Delmanzo's ownership could not avail against the forfeiture, then he could create no lien that would be operative against it, and his mortgagee and the assignee of the mortgage occupy no better position than does the owner and mortgagor. These conclusions are only to be avoided by showing that no grounds of forfeiture existed, and upon this question no issue is made.

The objections to the intervenor's petition must be sustained.

WILLIAM P. KERR vs. THE SOUTH PARK COMMISSIONERS *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—SEPTEMBER, 1878.

1. PLURIES EXECUTION—IRREGULARITY.—A levy and sale of lands under a *pluries* execution when a prior levy under the same judgment remained undisposed of, instead of issuing a *venditioni exponas*, is at most a mere irregularity which can only be taken advantage of in apt time.

2. SALE OF HOMESTEAD UNDER EXECUTION.—In Illinois the sale of property, while occupied as a homestead, by virtue of an execution and levy is void, and it makes no difference whether the premises are worth more or less than the $1,000 allowed as the limit in value of the homestead.

3. EXTENT OF HOMESTEAD—LOT.—But in giving construction to the term "lot" as used in the homestead law, the court will confine it to the forty acre tract, according to governmental survey, upon which the residence of the debtor is situated.

4. SALE EN MASSE.—If the sheriff sells as one tract two forty acre pieces of land, one of which is the homestead, the sale will be set aside as to the entire eighty acres.

5. ABANDONMENT OF HOMESTEAD—WIFE'S INTENTIONS AND DECLARATIONS.—In determining whether there has been an abandonment of the homestead, regard must be had as well to the purposes and declarations of the wife, as of the husband, and where there is an intention or desire on the part of the wife to return, the right of homestead may not be lost, even though the husband did not intend to return.

This case involved the title to about 196 acres in the South Park of Chicago. It presented several important questions under the execution and homestead statutes of Illinois.

Defendant Charles B. Phillips became the owner in fee of this land about the year 1849. All parties claim under him, as a common source of title. Dec. 18, 1858, Kerr, in an action of assumpsit, instituted in the Superior Court of Chicago, recovered a judgment against Phillips for the sum of $6,410.78. Dec. 31, 1858, execution issued upon that judgment, and

was levied upon all right, title and interest which Phillips had in the land, upon which, at that time, he resided with his family. The property was advertised for sale, but by order of plaintiff's attorney, the sale was waived, and the execution returned, April 25, 1859, for want of bidders.

Jan. 7, 1859, a warranty deed from Phillips to Daniel S. Sweeney, of New York, for this land was put upon record. It bears date prior to Kerr's judgment, to-wit: Oct. 5, 1858, appears to have been acknowledged on the 4th of January, 1859, and states the consideration to be $20,000.

Feb. 5, 1859, a deed for the land from Phillips and wife to Sweeney was put upon record. It is dated Oct. 5, 1858, was acknowledged by Phillips on the 4th of January, 1859, and by Mrs. Phillips Feb. 5, 1859. Consideration $20,000.

April 18, 1859, a deed for the land from Sweeney to Thomas Wright, Sr., (the father of Mrs. Phillips) was recorded. It is dated Dec. 4, 1858, and was acknowledged Jan. 4, 1859. Consideration $9,000.

Dec. 14, 1859, an alias execution issued upon Kerr's judgment, and was levied upon Phillips' interest in the land, which was duly advertised for sale, but no bids were offered, and the execution, by order of plaintiff's attorney, was returned without further proceedings thereunder.

Jan. 5, 1862, the dwelling house, in which Phillips lived with his family, upon this land, was destroyed by fire. His family remained in the neighborhood for a short time, and then went to the residence of Mrs. Phillips' father, in the state of Ohio, remaining there for many years. The dwelling house was insured for $3,000, and the furniture at $500. The insurance was taken out in the name of Phillips, as agent of Thomas Wright. Some dispute arose as to whether Wright or Phillips was entitled to the insurance money. The company declined to pay more than $1,900. The parties finally reached an understanding, the result of which was

that Phillips received about $1,000 of the $1,900, and the remainder was paid to Wright.

Jan. 13, 1862, upon the occasion of the settlement about the insurance money, Wright and Phillips entered into a written agreement by the terms of which Wright, upon the performance of certain covenants and undertakings by Phillips, agreed to convey the land in controversy to Phillips, free and clear from all incumbrances whatsoever.

June 2, 1863, Wright and Phillips had some settlement in reference to their business, resulting in a written indorsement, signed by both, upon the contract of Jan. 13, 1862, as follows:

"All the transactions named, and all other transactions, whether within named, or not so named, between said Wright and said Phillips, from the beginning of the world to this day, are declared to be canceled and settled, and each party doth hereby release, acquit and discharge the other from, and of, all debts, claims, and demands, covenants, promises, acts, neglects, commissions and commission of every name and kind, at and prior to the date hereof."

June 5, 1863, a deed from Wright and wife to Martin, was recorded, dated Jan. 1, 1863 (about the day of settlement between Wright and Phillips), acknowledged June 2, 1863, and reciting a consideration of $20,000.

June 18, 1863, a *pluries* execution was issued upon Kerr's judgment of Dec. 18, 1858, and levied the same day upon Phillips' right, title and interest in this land. Under this levy a sale at public vendue was had on the 17th of July, 1863, when Kerr became the purchaser of all the land except twenty-six acres, at the sum of $5,800; and on the 13th of August, 1863, he became the purchaser, at public sale, of that twenty-six acres, at the sum of $2,561.36. Subsequently, on Dec. 16, 1864, Kerr received the sheriff's deed for all the land thus purchased at public sale.

Dec. 15, 1863, a deed from Martin to Charles P. Burton, dated May 7, 1863, acknowledged May 21, 1863—consideration $65—was put upon record. Of none of the foregoing deeds did Kerr have any knowledge until after they were recorded.

Feb. 23, 1864, Phillips, in a suit instituted by him in the Superior Court of Chicago, against Kerr, to recover damages for an alleged violation of a contract in reference to certain lands in Johnson county, sued out an attachment, and the same was levied upon the land in controversy, *as the property of Kerr*. He obtained judgment, upon publication, and by default, against Kerr for $7,052. Under that judgment this land was sold and struck off to "Charles P. Burton." Another piece of the land was sold under the same judgment, of which Mixer became the purchaser.

Nov. 1, 1864, Phillips brought a second attachment suit against Kerr, and the land was again levied on *as the property of Kerr*. In the latter case Kerr pleaded *non est factum* to the contract sued on, and that suit was subsequently dismissed at plaintiff's costs.

It should be observed that during the year 1864, Phillips, by a decree rendered in an Indiana court, obtained a decree of divorce from his wife, without notice to her in any form of the pendency of such action.

Feb. 17, 1865, Kerr sued in equity in the Superior Court, asserting that the contract sued on by Phillips was a forgery, and seeking to enjoin the judgment in the first attachment suit. Mixer made default, but Phillips defended. A final decree was rendered on Sept. 20, 1865, declaring the agreement sued on, a forgery, setting the judgment and sale aside, and granting a perpetual injunction.

May 1, 1865, while the last named action was pending, Phillips professing to act as attorney for "Charles P Bur-

ton," made a lease of the land in controversy to Levi Blackwell, who took possession thereunder.

In August, 1866, Kerr sued Blackwell and "Burton" in ejectment, in the Superior Court in Chicago, to recover possession of the land. There was no actual service of process upon "Burton," but Blackwell was served. He made default, and judgment against him was taken on the 3d of September, 1866, and Kerr was put into possession.

September 2, 1868, a motion was made in the ejectment suit in the name of "Charles P. Burton" for a new trial. Among the affidavits filed in support of this motion was one by Phillips, who represented himself as agent and attorney for Charles P. Burton, and stating that Burton was a resident of California. He recites in his affidavit the various conveyances above referred to, including the one from Martin to Burton in May, 1863, at which time he claims to have surrendered possession to Burton. An order was entered granting a new trial, but upon the same day a motion was entered, in behalf of Kerr, to set aside that order, on the ground that it had been obtained by fraud. On the 10th of December, 1869, the order granting a new trial was set aside and the original judgment ordered to stand.

On August 31, 1868, Mrs. Phillips entered into the first of several agreements with Charles H. Atkins.

That between Mrs. Phillips and Atkins of August 31, 1868, recites the recovery of the judgment by Kerr against Phillips, the sale under execution, purchase by Kerr, and sheriff's deed; that Mrs. Phillips claims homestead and right of dower in the premises; that Burton, who claims title against Kerr, has conveyed to Atkins the half section, less the north one hundred and three acres, for the purpose of aiding to set aside the sheriff's sale, in consideration of which, Atkins agrees to use his best endeavors to have Kerr's title set aside, to employ counsel and institute suits, and conduct

the proceedings at his own expense; and in the event of success, and establishing his title to the half section less the north one hundred and three acres, he is to pay her $500, and convey to her an undivided five acres, and she to release to him all claim to the balance of the half section, including homestead and dower; she to execute all necessary papers and render all reasonable assistance.

A second agreement, made November 26, 1868, between Atkins and Thomas Wright, father of Mrs. Phillips, recites the former agreement; that Mrs. Phillips has become dissatisfied with it; substitutes an undivided ten acres in lieu of five, to be conveyed to Mrs. Phillips, she to be paid $500; and then provides that if Mrs. Phillips can recover against Charles B. Phillips as much as twenty-five acres out of the north half, for alimony, she shall surrender all claim to any portion of the south half. Wright and Mrs. Phillips to do nothing to the injury of Atkin's title, nor embarrass him in any way in the conduct of the litigation, but are to render him all possible aid in the conduct of the litigation to recover the land from Kerr.

On January 2, 1869, another agreement was made between Mrs. Phillips and Atkins. It recites the first agreement and the provision that Mrs. Phillips is to receive ten acres upon recovering the land from Kerr, leaves out the contingency in regard to the recovery of alimony from Phillips; requires Mrs. Phillips and Wright to render all necessary aid in their power to recover the land from Kerr, Atkins to pay all expenses of litigation.

Phillips seemed to have coöperated in this movement, and professing to act as attorney for Burton, made a deed of the land to Atkins in 1868. On the same day Mrs. Phillips made a deed of the property to Atkins. And on the same day Atkins conveyed back to Phillips "in trust for Burton" the north one hundred and three acres of the half section.

The record shows various other deeds after the transaction with Atkins. May 3, 1869, Phillips, attorney in fact for "Burton," conveyed the north one hundred and three acres to Georgia P. Clark. She, on May 8, 1869, conveyed the land back to Phillips "for the benefit of Burton." June 18, 1869, Phillips conveyed to his brother, John Phillips, reciting Atkins' delinquency in not performing his agreement to clear the title. "Burton," the same day, by Phillips, as attorney in fact, quit claimed to John Phillips. July 1, 1870, John Phillips quit claimed to the South Park Commissioners for $1. July 20, 1870, Charles B. Phillips made a like conveyance to the South Park Commissioners, and March 20, 1870, David A. Martin quit claimed to the commissioners; consideration, $250.

The general object of this suit by Kerr was to obtain a decree establishing his right against all of the defendants, to the entire tract of 196 acres.

F. H. Kales, *Lyman Trumbull* and *M. W. Fuller*, for South Park Commissioners.

Robert Rae, and *D. K. McRae*, for Mrs. Phillips.

W. C. Goudy, *S. B. Gookins*, *J. C. Dunlevy*, and *H. S. Monroe*, for W. P. Kerr.

HARLAN, J. (orally, after stating the facts)—Numerous questions have been presented by counsel in elaborate oral and written arguments, characterized by very great ability. The court does not deem it necessary to express its opinion upon each of those questions, since its conclusions upon some of them seem to be sufficient to dispose of the case.

First—It is claimed by defendants that no right was acquired by the levy of June 18, 1863, under the *pluries* execution, nor by the sale under that levy, because there had been a levy, under a previous execution, for the same debt,

which last levy remained undisposed of, when the execution of June 18, 1863, was issued.

Assuming that the levy made under the execution of December 14, 1859, was not waived by the order of plaintiff's attorney to return it without further proceedings, and conceding, as must be done, that the proper and regular mode to give effect to the levy under that execution, was to issue a *venditioni exponas* and not a *pluries* execution, the court is not prepared, in view of the authorities and what seems to be the settled practice in this state, to say that a subsequent levy and sale under the *pluries* execution, issued upon the same judgment, and levied upon the same property, for the same debt, was void.

The issuing of the *pluries* execution should rather be considered as a waiver of any rights acquired by the levy under the former execution. It was, at most, a mere irregularity to issue the *pluries* execution rather than a *vend. ex.*, but advantage of that irregularity should have been taken (if it could have been taken at all,) in apt time. The subsequent conduct of Phillips in the attachment and other suits heretofore referred to, in connection with the long delay in urging such objections, estops him and all claiming under him from urging such an objection in this litigation.

Second, The most important and difficult questions before the court are those which arise under or in connection with the homestead act of this state.

On behalf of the defendants it is claimed that when the levy was made under the execution of June 18, 1863, as well as when the sales took place thereunder, the land in controversy, the entire tract of one hundred and ninety-six acres, was the homestead of Phillips, and wholly exempt from levy and forced sale under execution or other judicial process; that, consequently, the sale was in all respects void, conferring no right upon Kerr which he can assert in this

suit, against Phillips or against Mrs. Phillips, or against any one holding title under them.

It is necessary here to examine the provisions of the homestead statute, and ascertain the settled construction of its provisions by the Supreme Court of Illinois, when the rights here in controversy, accrued. Whatever that construction has been, it will be the pleasure, as it is the duty, of this court to give it effect in this case.

By the first section of that act it is declared that "in addition to the property now exempt by law from sale under execution, there shall be exempt from levy and forced sale, under any process or order from any court of law or equity in this state, for debts contracted from and after July 4, 1851, the lot of ground and the buildings thereon, occupied as a residence, and owned by the debtor, being a householder, and having a family, to the value of $1,000." "Such exemption," it is provided, "shall continue after the death of the householder for the benefit of the widow and family, some or one of them continuing to occupy such homestead, until the youngest child shall become twenty-one years of age, and until the death of such widow; and no release or waiver of such exemption shall be valid unless the same shall be in writing, subscribed by such householder and his wife, if he have one, and acknowledged in the same manner as conveyances of real estate are by law required to be acknowledged."[1]

Other sections of the homestead law are as follows:

§ 2. EXCEPTIONS.—"But no property shall, by virtue of this act, be exempt from sale for non-payment of taxes or assessments, or for a debt or liability incurred for the purchase or improvement thereof."

§ 3. VALUATION OR DIVISION BY A JURY.—"If, in the opinion of the creditors or officer holding an execution against such householder, the premises claimed by him or her, as exempt, are worth more than $1,000,

[1] Statutes of Illinois, (Gross) 1871, Chapter 48*a*, Section 1.

such officer shall summon six qualified jurors of his county, who shall, upon oath to be administered to them by the officer, appraise said premises, and if, in their opinion, the property may be divided without injury to the interest of the parties, they shall set off so much of said premises, including the dwelling house, as in their opinion shall be worth $1,000, and the residue of said premises may be advertised and sold by such officer.

§ 4. "In case the value of the premises shall, in the opinion of the jury, be worth more than $1,000, and cannot be divided, as is provided for in this act, they shall make and sign an appraisal of the value thereof, and deliver the same to the officer, who shall deliver a copy thereof to the execution debtor, or to some one of the family of suitable age to understand the nature thereof, with a notice thereto attached, that unless the execution debtor shall pay to the said officer the surplus over and above the $1,000, on the amount due on said execution within sixty days thereafter, that such premises will be sold."

§ 5. SALE—HOW MADE.—"In case such surplus, or the amount due on said execution, shall not be paid within the said sixty days, it shall be lawful for the officer to advertise and sell the said premises, and out of the proceeds of such sale to pay such execution debtor, the said sum of $1,000, which shall be exempt from execution for one year thereafter, and apply the balance on such execution: *Provided*, That no sale shall be made unless a greater sum than $1,000, shall be bid therefor; in which case the officer may return the execution for want of property.

§ 8. "Whenever the dwelling house, or the building occupied as a homestead, and under the laws of this state exempt from execution and forced sale, shall have been insured by the person entitled to the benefit of such exemption, and a loss by fire or otherwise, shall occur in such manner as to entitle the person insured, to the benefit of such insurance, or any part thereof, the insurance company or companies liable for such loss, shall pay the same directly to the owner of such house or building, notwithstanding the service of garnishee process, or proceedings by creditor's bill, or otherwise, on the part of creditors of the insured; and the claim and demand of the insured against such insurance company or companies, shall be exempt from execution, attachment, garnishee process, or other proceeding on the part of creditors of the insured, to the same extent as the property so insured and destroyed, or injured, was exempt therefrom: *Provided*, That nothing herein contained shall be construed to exempt more than $1,000, due on any insurance as aforesaid, from liabilities to attachment or other proceedings on the part of creditors."[1]

Numerous decisions have been rendered by the Supreme

[1] Statute of Illinois, (Gross,) 1871, chapter 48*a*.

Court of Illinois, in which this homestead act has been construed. In *Hartwell vs. McDonald*, 69 Illinois, 293, that court, in reviewing its former decisions, said that it had uniformly held:

"That a judgment is not a lien upon homestead premises.

"That the owner may sell or mortgage the same, free from the lien of the judgment, and that no liability can attach to the lands in the hands of the purchaser, for the previous judgment debt of his grantor.

"That the property is neither subject to a lien, a levy, or a forced sale, under judicial process while occupied as a homestead.

"That it does not vary the result whether the premises are worth more or less than $1,000; that if not worth more than that sum, the sale is prohibited by the statute, and if worth more, then none of the requirements of the statute having been observed in making the levy and sale, the sale is unauthorized."

The court then proceed to say:

"The sales referred to being, of course, such as are made without regard to the provisions of the act, as was the sale in this case, property thus situated is held not to be liable to levy and sale on execution, and such sales of it are held to be inoperative and void, and that the purchaser acquires no title thereunder."

It cannot be doubted that when Kerr obtained his judgment against Phillips, the latter had a homestead right in this land. It was at that time, and until the destruction of his dwelling house in January, 1862, owned and occupied as a residence for himself and family. Whether that homestead right extended to the whole tract of 196 acres, or only to a part thereof, will be hereafter considered. For the present, we only say that, so far as he had a homestead in the land, it was exempt from levy and forced sale. That homestead

right was subject to such disposition as he, in connection with his wife, chose to make of it, free from any lien of Kerr's judgment. So far as *that right* was concerned, it is immaterial what was the consideration upon which Phillips made and caused to be made the several deeds referred to.

Third—We come now to inquire whether this homestead right, at the time of Kerr's judgment, extended to the whole 196 acres. Upon a careful examination of all the decisions of the Supreme Court of this state, to which counsel have called attention, the court is of opinion that the homestead exemption did not extend beyond the forty-acre lot upon which the dwelling house of Phillips stood, when it was destroyed by fire. It is "the *lot* of ground and the buildings thereon, occupied as a residence, and owned by the debtor," which the statute exempts from levy and forced sale. In determining the extent of the homestead right, it is sometimes important to inquire how much, at the time, is claimed by the householder. It is often, if not always, a question of fact, how much of a particular body of land can be fairly said to belong to the homestead; that is, to "the lot of ground" occupied as a residence. In *Hill vs. Bacon*, 43 Illinois, 478, it was decided that the court will take judicial notice that a quarter section of land is made up of four forties, each with well defined bounds. In that case, the forty-acre part of the quarter section upon which the residence and improvements stood, was declared to be a *lot* within the meaning of the homestead act. That case was reaffirmed in *Linton vs. Quimby*, 57 Illinois, 272. In the case of *Gardner vs. Eberhart*, 82 Illinois, 320, the court said that a farm may consist of several "lots of ground," within the meaning of the homestead act, but the statute exempts only the lot occupied as a residence.

The court in that case said: "It will take judicial notice of the government surveys of the public lands, and that a

quarter section of land consists of four forties, each with well defined bounds. If the forty on which the resident buildings are situate does not exceed $1,000, in value, it is exempt." Of this construction of the law the execution creditor in this case cannot complain. The doubt the court has, is whether the homestead exemption might not also be extended to the forty acre lot over part of which the garden extended. But under all the facts and circumstances proven, the court is of opinion that the letter and spirit of the law is best satisfied by holding that the forty acre lot upon which the residence stood was altogether exempt from levy and sale under the homestead statute, and that its sale under Kerr's judgment was inoperative and void, unless, at the time of the levy and sale under the execution of June 18, 1863, the homestead right had been lost by abandonment. The established doctrine of the Illinois court seems to be that the homestead right may be lost by abandonment; such appears to be the rule as announced in these cases: *Titman vs. Moore*, 43 Illinois, 169; *Maher vs. McConaga*, 47 do. 392; *Vasey vs. Board of Trustees*, 59 do. 191; *Wright vs. Dunning*, 46 do. 274; *Howard vs. Logan*, 81 do. 386; *Potts vs. Davenport*, 79 do. 458.

Upon examining these and other adjudged cases it will be found that the decision turns largely upon the special circumstances of each case. The general rule, however, is laid down that abandonment exists when the facts show the absence of the *animus revertendi*. When the family once leaves the homestead and lives elsewhere, some of the cases hold that the evidence of a purpose to return must be clear and definite. Some of the cases recognize the homestead right, although the dwelling has been destroyed by fire. The right to rebuild and re-occupy as a residence is recognized, if the purpose to do so in good faith exists.

But none of the cases prescribe any definite time within

which return must take place. In some of the cases as much as two years expired after leaving the homestead premises without the homestead right of exemption being lost by abandonment. In this case the dwelling house of Phillips was consumed by fire in January, 1862. Without detailing the circumstances under which it was destroyed, it is sufficient to say that there is persuasive evidence to justify the conclusion that after the fire it was the purpose of Phillips to so conduct himself as to force his wife to leave him, whereby he could the better carry out his purpose to obtain a divorce. That his wife went to her father's, in Ohio, from absolute necessity, resulting from the failure of her husband to make proper provision for her, the evidence does not permit the court to doubt. She remained there as long as she did, from the same necessity, caused by the same neglect and failure. That from the very day of the fire she desired to return to her home near Chicago, and have the dwelling house rebuilt upon the same spot, is quite clear.

Her letters and her conduct clearly establish that her desire in that direction was known to all of her friends and to Phillips, and, as some of the evidence shows, to the agents of Kerr, if not to Kerr himself.

The homestead law was designed for the benefit of the wife and children as well as for the husband. In some of the cases it is declared that the husband as the head of the family, having the legal power, as such, to control the movements and residence of his family, may abandon the homestead so as to deprive the wife and children of the beneficent provisions of the statute. But such general expressions must be construed in reference to the facts of the particular cases in which they occur. They cannot be applied to a case like this without defeating one of the very objects of the homestead statute, which was to provide a shelter for wives and children, and thereby erect barriers against the increase of

vagrancy and pauperism. Here the husband evidently had no purpose to return to the old homestead, or again to live with his family after they left Chicago for Ohio, where a temporary home had been offered by the wife's father. The court is forced by the evidence to the conclusion that Phillips did not desire his wife to return to him or to the homestead, because that might interfere with his plans in reference to the land. But, in determining whether the homestead right had been abandoned at the time of levy and sale, the court must not look alone to the purposes of the husband, or solely to his declarations. Some regard must be had to the purposes and declarations of the wife, to whom the statute secured rights in the homestead. The abandonment of her by her husband made her in some sense the head of the family, with the right to entertain independent purposes in regard to the homestead. Looking at all the evidence, and to the conduct of the parties, the fair conclusion is, that the homestead right, which unquestionably existed in the forty acre lot referred to, at the date of Kerr's judgment, and at the time of the fire, had not been lost by abandonment at the time of the levy and sale under which Kerr claims. Consequently the sale of that much of the one hundred and ninety-six acres was in violation of the statute.

The fact that Phillips received a part of the money paid by the insurance company should not be allowed, under the evidence in this case, to defeat the claim of homestead exemption. It is not clear that it was paid to, or received by Phillips as insurance money to which he was legally entitled. Upon the face of the policy it all belonged to Wright. He alone could demand it of the company. The reasons which induced him to divide the insurance money do not clearly appear. Besides, it is doubtful whether a large portion of the $1,000 received by Phillips did not cover the insurance upon the furniture in the house when it was destroyed.

We are not satisfied that the statute about insurance of the homestead has, under the evidence, any application to the case.

Fourth—We come, now, to inquire as to the sale of the remaining portion of the 196 acres.

From the facts detailed and from what has been said, it will be seen that the questions as to the remaining portion of the 196 acres involve considerations of a different character. This part of the case is somewhat complicated, because of the numerous deeds which Phillips made and caused to be made, after Kerr sued him in 1858. The deeds from Phillips to Sweeney, from Sweeney to Wright, from Wright to Martin and from Martin to Burton, were all fraudulent contrivances upon the part of Phillips, to hinder and delay Kerr, and perhaps other creditors. Of that the court has no doubt. No consideration passed from Sweeney to Martin. Wright had a claim against Phillips of small amount, but the object of Phillips in placing the title in him and afterward in Martin, was that the property might be held for him, and that he might the more readily evade the demands of creditors. As to "Burton," he seems to have been in one sense a myth. The evidence satisfies the court that it was a name conveniently used by Phillips, without the knowledge of Burton, if there was such a person, for the purpose of concealing his plans and movements touching the property in controversy. The conveyance from Martin to Burton is to be deemed as a conveyance to Phillips by the name of Burton. These views are strengthened by the subsequent conduct of Phillips in having the property attached as Kerr's property, and by his efforts to set aside the judgment in the ejectment suit, using the name of Burton, when no such person existed. Wherever the name of Burton appears in any deed, power of attorney, or judicial proceeding, it must be regarded as meaning Charles B. Phillips. In view of these facts, it is

clear that all these conveyances, made prior to the levy and sale under Kerr's execution, so far as they covered property other than the homestead, were void as to Kerr. He had the right, even had he known of these conveyances, to disregard them totally, and have the sale of the property outside of the homestead proceed without reference to them. They were valid only so far as they covered the exempted homestead, the right to which remained at the time of the levy and sale, although the title to the land was placed in others for Phillips' use and benefit.

The sale of the land other than the forty-acre homestead, was, therefore, in accordance with the statute. The exemption of that part from levy and sale did not prevent the creditor from levying upon and selling the other portions of the one hundred and ninety-six acres. Such a sale did not violate the debtor's statutory right of exemption, as will be seen by reference to the cases of *Gardner vs. Eberhart*, 82 Illinois, 321; *Hill vs. Bacon*, 43 do. 478; *Linton vs. Quimby*, 57 do. 272.

Kerr, by his execution sale, acquired a good title to all except the forty-acre homestead tract, and is entitled to relief to that extent. His counsel will prepare the necessary decree, and after showing it to counsel for defendants will present it to the court for examination.

A petition for rehearing was subsequently filed, calling attention to the fact that the forty acres, upon which the residence stood, and which had been adjudged to be the homestead lot, was sold by the sheriff, in connection with the forty acres immediately north of it, those two tracts of forty acres each being sold *as one tract of eighty acres*, for $1,500. The court, upon the authority of *Linton vs. Quimby*, 57 Illinois, 273, modified its former ruling, and held that the execution sale was void as to this entire eighty acres. A decree to that effect was entered. Both sides appealed to the Supreme Court of the United States, which, at the October Term 1881, affirmed the decree below. The affirmance being by a divided court. [*Reporter.*

JOSEPH R. PAYSON, Assignee, vs. BENJAMIN F. HADDUCK, Jr., *et al.*

District Court—Northern District of Illinois—October, 1878.

In Equity.

1. Administration of Estates — Contingent Claims not Barred by Two Years' Limitation Statute.—A contingent claim which is not due, or which had not accrued prior to the close of the administration of an estate, is not barred by the Illinois statutory two years' limitation of time within which to exhibit claims against a decedent's estate.

2. Liability of Heir for Ancestor's Liabilities.—The heir is liable to the extent both of the personal and the real estate received from his ancestor, for the contracts or liabilities of the ancestor, and where these claims have not accrued until after the administration of the estate is closed, suit may be brought and maintained against the heir, to the extent of the assets derived from the ancestor.

3. Equity Jurisdiction — Capital Stock Assessment.—Where the ancestor holding capital stock in a corporation, subject to assessment, died, and subsequent to the close of administration of the estate, an assessment was made upon the stock: *Held*, That a suit in equity could be maintained against the heirs for such assessment to the extent of assets received from the ancestor.

Tenneys, Flower & Abercrombie, for complainant.

Mattocks & Mason, for defendants.

Blodgett, J.—I will say to counsel that I have not had time—I have not been able to take such time as I could have wished, in following out the interesting questions that are raised in this case. I have only been able to give the case such cursory examination as has satisfied my own mind; and what I say in disposing of the case, I do not wish to have

considered as an exhaustive discussion of the questions of law raised, and which have been so ably argued by counsel.

The facts which are set out in the bill, and admitted by the demurrer, are briefly these:

Prior to the great fire of October, 1871, in this city, there existed in this state a corporation known as the Republic Fire Insurance Company, created under the statutes of this state, and having its proper office and place of business in the city of Chicago. The stock of this company had been issued to the amount of $5,000,000, upon which 20 per cent. had been paid in, and the remaining 80 per cent. was subject to the call of the directors whenever there should be an impairment of the capital by losses. By the great fire in this city, the company became insolvent, and in the course of the year 1872—the date is not material for the purposes of this question—was declared bankrupt, and an assignee duly appointed. Benjamin F. Hadduck was a stockholder in the company to the amount of 500 shares of $100 each, making $50,000, upon which he had paid his first installment of 20 per cent., and was liable to an assessment for the remaining 80 per cent. under the terms of the charter and by-laws of the corporation. Mr. Hadduck died in December, 1871, and letters of administration were issued upon his estate in the Cook County Court, during the early part of the year 1872. Shortly after the company was declared bankrupt, the assignee presented to this court an application for an assessment upon the stockholders of 60 per cent. upon their unpaid stock. This assessment was made by the court, and in due course of time so much of it was collected as was collectible. In October, 1876, the assignee represented to the court in a proper manner, by petition, that he had collected all of the 60 per cent. assessment which he was able to collect, and asked for a further assessment of 10 per cent. with which to liquidate the unpaid indebtedness of the cor-

poration. This assessment was ordered to be made on the 18th of October, 1876.

The assessment of 60 per cent. which was made against all of the stockholders was paid by the administrator of Mr. Hadduck's estate in due course of administration, between the time when the assessment was made, and December, 1874; and in December, 1874, the administrator completed the administration, and the estate was declared closed, and the assets, which consisted of about $61,000 of personal property, moneys and credits, and something over that amount in real estate, were duly, by order of court, distributed to the heirs-at-law, who consisted of the widow and one son, Benjamin F. Hadduck, Jr.

It will be seen that the administration of the estate was closed after the 60 per cent. assessment was paid, and before the 10 per cent. assessment was made; and on the making of the 10 per cent. assessment, a call was made upon the administrator, widow and heir-at-law, for this 10 per cent., which they have refused to pay.

The assignee now brings this bill in equity to enforce the payment of this assessment against the widow and heir, and to that bill defendants demur, assigning two causes of demurrer:

First—That this action, and the claim, is barred by section 70, of chapter 3, of the Revised Statutes of Illinois, in reference to limiting claims against the estates of deceased persons to two years from the time the letters of administration are issued.

Section 70, which is invoked in this case, reads as follows: "All demands against the estate of any testator or intestate shall be divided into classes, in manner following, to-wit:

"*First*—Funeral expenses.

"*Second*—The widow's award, if there is a widow; or children, if there are children, and no widow.

"*Third*—Expenses attending the last illness, not including physician's bill.

"*Fourth*—Debts due the common school or township fund.

"*Fifth*—All expenses of proving the will," etc.

"*Sixth*—Where the decedent has received money in trust for any purpose, his executor or administrator shall pay out of his estate the amount thus received and not accounted for.

"*Seventh*—All other debts and demands, of whatsoever kind, without regard to quality or dignity, which shall be exhibited to the court within two years from the granting of letters, as aforesaid; *and all demands not exhibited within two years as aforesaid shall be forever barred,* unless the creditors shall find other estate of the deceased, not inventoried or accounted for by the executor or administrator, in which case their claims shall be paid *pro rata* out of such subsequently discovered estate, saving however to *femes covert*, infants, persons of unsound mind, or imprisoned, or without the United States in the employ of the United States or of this state, the term of two years after their respective disabilities are removed, to exhibit their claims."

It is insisted on the part of the defendants in this suit, that the remedy of the assignee, as against them, is lost by the operation of this statute; that this claim should have been exhibited to the administrator of Mr. Hadduck before his discharge, and should have been proved and allowed by the County Court, and that the failure so to exhibit it and have it allowed by the County Court, during the progress of the administration of the estate, forms a complete bar to the claim.

The second point urged is that the form of action or proceeding to recover this assessment should have been by a suit at law, and not in equity.

The question which is presented by this demurrer raises the point as to whether a contingent claim which is not due,

or cannot be said to have accrued during the term of the administration of the estate of a deceased person, is to be barred by the operation of this statute. There are a large number of claims which we can imagine may arise against the estates of deceased persons, which cannot be said to have accrued at the time the letters of administration are issued, or during the two years of the administration, such as actions of covenant for breaches of warranty made by the ancestor during his lifetime, and where the breach may not occur until long after the expiration of the limitation here provided for, and long after the settlement of the estate in the Probate Court; such, also, as liabilities in favor of sureties upon bonds where the liability of the surety is not fixed, perhaps, until long after the close of the estate in the Probate Court; and numerous cases of contingent liabilities may be imagined where the party could not present a claim to the Probate Court or exhibit it to the administrator during the two years of limitation which is here provided for; and the question is, does this statute of limitations run as against that class of claims?

I have come to the conclusion from examination of authorities that it cannot be said to run as against any contingent claim where the right of action has not accrued, and does not accrue, before the settlement of the estate is closed.

Without examining or reading the authorities at length upon the subject, I will call the attention of counsel to the case of *Hall vs. Martin*, reported in 46 New Hampshire, 337, which seems to me to more completely cover all the questions which are raised in this case than any other which I have been able to find. It will be sufficient for the purposes of this discussion that I read the syllabus of the case, as I think that fairly states the conclusion of the court:

"At common law the heir was liable on the covenants of his ancestor in which he was specially bound, just so far and

no further, as he had assets by descent; and as real estate alone descended to him, his liability was limited to that.

"But where by our statute the personal estate is made to descend to him substantially in the same way, a correct application of the common law principle requires it to be treated as assets in his hands equally with the real estate; and it was, therefore, held that such heir is liable on the covenants of his ancestors, which could not have been proved while the estate was in the course of administration, to the extent of the personal as well as the real estate which has so descended to him.

"Suits against an heir or devisee are not barred by the provisions of the Revised Statutes limiting actions against executors or administrators of solvent estates, where no funds are retained for contingent claims by order of the judge of the Probate Court, to three years from the original grant of administration.

"But the limitation applies only to suits against the executor or administrator, and therefore the remedy against the heir or devisee upon claims which could not be proved during the three years because contingent, is not barred by these provisions, but remains as in the case of insolvent estates."

There are, of course, some provisions discussed in this opinion which are peculiar to the statute of New Hampshire in regard to the settlement of estates, such as those which apply to insolvent estates as distinguished from solvent estates, where, in cases of solvent estates, the administrator is required, or may be required, by order of the court to retain in his hands upon final settlement, or there may be retained in the hands of the court, a certain amount of funds to meet contingent liabilities which have not yet accrued; and so far as the discussion in this case applies to the particular provisions of the New Hampshire statute, of course they are not germain to the case in hand. But the general

principle laid down is this: that the heir is liable to the extent both of the personal and the real estate received from his ancestor, for the contracts or liabilities of the ancestor, and that, where these claims have not accrued until after the administration of the estate is closed, suit may be brought and maintained against the heir to the extent of such assets which he derived from the ancestor. At common law the heir was not liable for the debts of the ancestor except upon covenants or bonds under seal, where the heir was specially named, and in those cases only to the extent of the real estate, because he only received real estate by descent. But this case breaks new ground, I think the court may say, and disregards the distinction upon principle between real and personal estate in the hands of the heir, because the law has made the heir the recipient of the personalty as well as realty from the ancestor—made him the heir to the personalty as well as to the realty, and the question of the bar of the statute—the bar of the New Hampshire statute being three years, instead of two as in our state—is discussed, and held not to apply to a case of this character; so that, without discussing the other cases, not perhaps analogous in all their facts or the findings of the court to this case, but tending in the same direction, which were cited on the part of counsel, I shall content myself with simply alluding to this case as in my mind furnishing a satisfactory basis for the conclusion at which I have arrived.[1]

I come now to consider for a moment the form of remedy to the assignee in this case, whether it is by suit at law or in equity.

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[1] See, also, *Pendleton vs. Phelps*, 4 Day, Connecticut, 476; *Neil vs. Cunningham, Ex'rs*, 2 Porter, Alabama, 171; *Jones' Ex'rs vs. Lightfoot*, 10 Alabama, 26; *Burton's Ex'rs vs. Lockhart's Ex'rs*, 4 English, Arkansas, 412; *Walker vs. Byers*, 14 Arkansas, 246; *Miller vs. Woodward*, 8 Missouri, 169; *Finney vs. The State*, 9 Missouri, 227.

Story's Equity Jurisprudence, at Section 1,216c, treating upon the jurisdiction of courts of equity, says:

"It is upon the same ground, that, where there is a specialty debt, binding the heirs, and the debtor dies, whereby a lien attaches upon all the lands descended in the hands of his heirs, courts of equity will interfere in aid of the creditor, and, in proper cases, accelerate the payment of the debt. At law the creditor can only take out execution against the whole lands, and hold them, as he would under an *elegit*, until the debt is fully paid. But, in equity, the creditor will also be entitled to an account of the rents and profits received by the heir since the descent cast." etc.

The doctrine, then, of this authority, which is fully sustained by the citation to which the author refers, seems to be that a court of equity did take jurisdiction of this class of cases where it was attempted to enforce a specialty debt as against an heir to the extent of the assets received from his ancestors by descent. Inasmuch as the Legislature of this state abolished by statute the distinction between a specialty and a simple debt, so far as the liability of the heir is concerned, of course the principle laid down here applies to the enforcement of a simple debt as well as a specialty debt or a covenant. By later legislation in England, an action at law may be maintained against the heir to the extent of the assets in hand, but we all very well know that courts of equity, where they originally took jurisdiction in many cases because of the inadequacy of the common law to afford an adequate relief, have retained jurisdiction, even after statutory provisions have removed the original cause for taking jurisdiction in equity, except in cases where there is a special provision clothing courts of law with the exclusive jurisdiction of the case. So that it seems from this authority that originally courts of equity were clothed with jurisdiction; and we find in two cases in our state, and in

fact more, but two notably, bills of this character were filed and entertained by the Supreme Court of this state; although there was no challenge of the jurisdiction upon the ground stated in this case.

The first is the case of *Thomas, Trustee, vs. Adams*, reported in 30th Illinois, at page 37, where there was an application made on the part of Thomas, trustee of the old State Bank, to collect the amount of several judgments recovered in favor of the bank, from the heirs of one Wynn, who was the judgment debtor, not upon the ground of a lien which had attached, but because of their liability under the law for their ancestor's debts.

The second is the case of *Vanmeter's Heirs vs. Love's Heirs*, 33 Illinois, 260. Those were both suits in equity, and the court seems to have treated that as the appropriate remedy.

In this particular case, waiving the general question as to whether there may or may not be in some cases an adequate remedy at law, it seems this is a peculiarly appropriate case for relief in a court of equity. This bill charges that there was a residuum of Mr. Hadduck's estate, after the payment of his debts, amounting to $61,000 in personal property, and over that amount in real estate, and that these were turned over by the administrator to the widow and heir. Now, under the statute of this state, the widow takes a certain share of the personalty. The personal property would seem, by all the analogies of the law of Illinois, to be the appropriate fund from which this personal liability should be paid; and it seems to me that the widow claiming under the statute in this state could be properly called upon to account for the portion of the personal property which she took under the statute, and the heir for his share. And running all through the cases, in fact, the way in which Mr. Justice Story groups this class of cases in his treatise

upon the jurisdiction of courts of equity, shows that courts of equity took jurisdiction of these cases because there was an implied trust upon the part of the heir to the extent of the funds which he received from the ancestor. It was a trust fund to be followed by the creditors as against the heir or even the devisee, and, therefore, it seems to me that the court should take jurisdiction of it upon the general principle of taking jurisdiction of a case where persons have in their possession trust funds which a creditor is entitled to follow.

In the second place, if the personalty is not sufficient, then the realty would be the next fund to apply to, and in that, the widow only taking her dower, and being entitled only to that as her vested right, it might be necessary to inquire by an accounting as to the value of the estate subject to the widow's dower, or it might be necessary to set off the dower, because, of course, the dower cannot have been divested by a claim of this character any more than any other contract debt against a husband, and a widow might hold her share of the real estate, and the heir be compelled to account for only so much as he had, subject to the dower; so that it seems to me there is in this case a peculiar fitness in holding that a court of equity has jurisdiction, because complete justice to all parties can only be done by a court of equity.

With these statements in brief, in regard to my views of the matter, I will overrule the demurrer.

MILAS J. HASSELL, Administrator, vs. MARTIN BASKET *et al.*

Circuit Court—District of Indiana—October, 1878.

In Equity.

1. Donatio Causa Mortis—Delivery.—*Donatio causa mortis* must be of personal property or *choses* in action, actually delivered by the donor to the donee, in apprehension of approaching death from an existing disorder, or other impending peril, and from which death must ensue without any complete intermission.

2. Title.—The gift must vest in the donee a present title, though it is defeasible until the death of the donor.

3. Certificate of Deposit—Indorsement.—The deceased, the donor, indorsed a certificate of deposit to the defendant, but the indorsement was of such a character as to absolutely prohibit the latter from claiming any present title to the money, or any right to demand payment until after the death of the donor: *Held*, not to be a *donatio causa mortis*.

This was a bill in chancery brought by Milas J. Hassell as administrator of Hillery M. Chaney, deceased, to recover from the defendant, Martin Basket, possession of a certificate of deposit, which had belonged to Chaney before his decease, and which the defendant claimed as *donatio causa mortis*.

A. & J. E. Iglehart and *T. T. Foreman*, for complainant.

Shackelford & Richardson, *Denby & Kumler*, *Jonathan W. Gordon*, and *J. J. Turner*, for defendants.

Gresham, J.—The bill in this case alleges that Hillery M. Chaney, a citizen of Sumner county, Tennessee, on the 8th day of September, 1875, deposited in the Evansville National

Bank, at Evansville, Indiana, $23,514.70, taking a certificate of deposit therefor; that in January, 1876, said Chaney suddenly died, and the plaintiff was appointed his administrator; that the defendant, Martin Basket, who was a nephew of Chaney, by a fraudulent combination with one Bryan, whose wife was a niece of Chaney, obtained possession of the certificate of deposit and refused to surrender the same on demand; that no consideration of any kind passed from the defendant Basket to Chaney for the certificate; that Basket claimed to hold the same by gift from Chaney, but that at the time of such alleged gift, and for a long time previously, Chaney was of unsound mind.

The National Bank, its president and cashier, and Messrs. Shackelford and Richardson, who as the counsel for the defendant Basket, have possession of the certificate, are made defendants.

The defendant, Basket, by his answer admits the possession of the certificate, and alleges that Chaney, sixty days before his death, then being in full possession of all his mental faculties, but in apprehension of death from a disorder with which he was then suffering, with his own hand wrote and signed the following indorsement on the certificate:

"Pay to Martin Basket, of Henderson, Ky., and no one else, then, not till my death. My life seems to be uncertain; I may live through this spell, then I will attend to it myself.

H. M. CHANEY.";

and delivered the paper so indorsed to the defendant, Basket; that Chaney died of the disorder, and the certificate remained in his (Basket's) possession until he placed it in the hands of his counsel, the defendants, Shackelford and Richardson; and that the certificate was a gift to him in trust, as well for himself as his brother and sisters, at his option.

The bank and its officers answered, asking the protection of the court in the payment of the money.

Basket filed a cross bill, setting up the gift as in his answer, and the plaintiff answered, traversing the material allegations. General replications were filed to all the answers.

For several years before his death Chaney had been in failing health, complaining of dyspepsia, and physicians had treated him for that disease. During the sixty days that elapsed between the delivery of the indorsed certificate to Basket, and Chaney's death, in January, 1876, he was generally up and about his premises looking after his business, as he had done for months previously. It appeared from a *post mortem* examination that he had also suffered from consumption. The testimony conclusively shows that at the time the certificate was delivered to Basket, Chaney was not *in extremis*, and that he did not act in apprehension of immediate death. On this point there was no serious controversy.

Chaney's domicile being in the state of Tennessee at the time of his death, the laws of that state determine the succession to his personal property.

In construing the statutes of Tennessee, relating to wills, the Supreme Court of that state has held that nuncupative wills must be made *in extremis*.[1]

Section 2,165 of the Tennessee Code, declares that no nuncupative will is good unless proved by two disinterested witnesses, present at the making thereof, who were specially requested by the testator to bear witness to it. The indorsement on the certificate has never been probated as a testamentary instrument according to the laws of Tennessee. It

[1] *Hatcher vs. Millard*, 2 Coldwell, 30; *Gwin vs. Wright*, 8 Humphrey, 689.

follows that the defendant, Basket, cannot claim the money as a testamentary gift.

The plaintiff, as administrator, is, therefore, entitled to the fund in controversy, unless it belongs to Basket, as a gift *causa mortis*. It would seem that the courts and law-writers have not always been clear in speaking of gifts of this kind.

In Kent's Commentaries, Vol. 2, *p. 444, we find the following:

"Such gifts are conditional, like legacies, and it is essential to them that the donor make them in his last illness, or in contemplation and expectation of death; and, with reference to their effect after his death, they are good, notwithstanding a previous will, and if he recovers, the gift becomes void.

In Story's Equity Jurisprudence, § 606, the gift is thus defined:

"It is, properly, a gift of personal property, by a party who is in peril of death, upon condition that it shall presently belong to the donee in case the donor shall die, but not otherwise. To give it effect, there must be a delivery of it by the donor; and it is subject to be defeated, by his subsequent personal revocation, or by his recovery or escape from the impending peril of death. If no event happens which revokes it, the title of the donee is deemed to be directly derived from the donor in his lifetime; and, therefore in no sense is it a testamentary act."

Williams, in his treatise on the Law of Executors and Administrators, in speaking of this kind of gift, Vol. 1, p. 771, says:

"*First*—The gift must be with a view to the donor's death.

"*Second*—It must be conditioned to take effect only on the death of the donor by his existing disorder. * * *

"*Third*—There must be a delivery of the subject of the donation."

In *Nicholas vs. Adams*, 2 Wharton, 17, the opinion of the court was delivered by Chief Justice GIBSON, who says:

"*Donatio causa mortis* is something spoken of as being distinct from a gift *inter vivos*, the former having sometimes been supposed to be made in reference to the donor's death, and not to vest before it, but inaccurately, as it seems to me; as this gift, like every other, is not executory, but executed in the first instance by delivery of the thing, though defeasible by reclamation, the contingency of survivorship or deliverance from the peril. The gift is consequently *inter vivos*."

Gifts *causa mortis* must be of personal property or choses in action, actually delivered by the donor to the donee, in apprehension of approaching death from an existing disorder or other impending peril, and death must ensue from such existing disorder or other impending peril without any complete intermission.

But without further effort to define such gifts, it is sufficient to say that they are not good and are never upheld without certain essential requisites, one of which is delivery, actual or constructive, to the donee, or some one in trust for him, of the subject matter of the gift. If the subject of the gift be capable of actual delivery, the delivery must be actual. Such gifts afford tempting opportunities for fraud, and therefore the Roman law required them to be executed in the presence of five witnesses. And inasmuch as delivery lessens the opportunity for fraud, it has always been held an absolute requisite to their validity. Money on deposit may be delivered by a delivery of the certificate of deposit, provided there be the intention at the time to transfer to the donee the dominion and ownership. It is now settled that

choses in action, whether negotiable or not, may be the subjects of gifts *causa mortis*.[1]

The money itself was not delivered to Basket, nor was the certificate so assigned to him as to enable him to get possession of it. With the certificate, as indorsed, he had no right to demand the money from the bank. If on his demand the bank had paid the money, such payment would not have protected it against another demand by the donor. The indorsement was not of such a character as to enable Basket to reduce the money to his possession. He could not by virtue of the indorsement have compelled the delivery of the money to him by the bank during the life of the donor. The donor, by the indorsement, had not parted with the possession or dominion of the property. It was still under his control. The language of the indorsement is certainly inartistic, but its meaning is patent. In legal effect it is, "If I die in my present illness, it is my intention that the money evidenced by this certificate of deposit shall belong to Martin Basket. When I thus die, and not before, it shall be paid to him." With this clear intention of the donor not to part with his money as long as he lived, it will not do to say that delivery of the certificate was a constructive delivery of the money evidenced by it.

But it is said that the subject of a gift *causa mortis* vests in the donee only at the death of the donor, and that therefore the conditions expressed in the assignment would have been implied, if the certificate had been delivered, with a blank indorsement, or no indorsement at all. It must be conceded that some of the authorities seem to support this view.

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[1] *Brunson vs. Brunson*, Meigs' Reports, 68; *Brown vs. Moore*, 8 Head, 671; *Meach vs. Meach*, 24 Vermont, 591; *Hanson vs. Millett*, 55 Maine, 184; *Cutting vs. Gilman*, 41 New Hampshire, 147.

A will is the disposition of one's estate, to take effect after his death. Any disposition of property to take effect upon the death of the owner or donor is testamentary. It is of the essence of a bequest that it take effect on the death of the testator. It appears by the very terms of the assignment that no present title or interest in the money could pass to the donee during the life of the donor. No instrument of writing can be both a last will and testament, and a gift *causa mortis*. The indorsement was testamentary in character, and if it had been properly executed according to the statutes of Tennessee, it doubtless might have been probated as the donor's will.

There is a wide difference between a legacy and a gift. Both possession and title must pass to the donee to constitute a gift. This applies as well to gifts *causa mortis* as to gifts *inter vivos*. The title must pass *inter vivos*, or it never can pass, but will go to the donor's legal representative. In a gift *inter vivos*, the donor reserves no right of revocation; in a gift *causa mortis* he does. The donee of a gift *causa mortis* holds the thing given, not as bailee of the donor, but as present owner on the condition attached to such gifts. A gift *causa mortis* vests in the donee a present but inchoate, or defeasible title until the happening of the event necessary to render it absolute, and therein it differs from gifts testamentary and gifts *inter vivos*. This question is discussed in *Gass vs. Simpson*, 4 Coldwell, 294. "The property," say the court, "must pass at the time, and not be intended to pass at the giver's death. * * * Upon the happening of the event upon which the gift is dependent, the title of the donee becomes by relation complete and absolute from the time of the delivery, and that without any consent or other act on the part of the executor or administrator; consequently the gift is *inter vivos*." [1]

[1] See, also, *Duncan vs. Duncan*, 5 Littell, 12.

In *Parish vs. Stone*, 14 Pickering, 198, the transfer of choses in action as gifts *causa mortis* is discussed. "These cases," said Chief Justice SHAW, in delivering the opinion of the court, "all go on the assumption that a bond, note, or other security, is a valid, subsisting obligation for the payment of a sum of money, and the gift is in effect a gift of the money, by a gift and delivery of the instrument which shows its existence and affords the means of reducing it to possession."

In the case at bar, the certificate was delivered, as the language of the indorsement clearly shows, with no intention of a present gift of the money, with authority to the donee to reduce it to possession. On the contrary, the indorsement was of such a character as to absolutely prohibit the donee from claiming any present title to the money, or any right to reduce it to his possession during the life of the donor.

The donor lived in Nicholas county, Kentucky, the place of his birth, until 1871, when he was sixty years old. He was married to Miss —— Hanby in 1832, with whom he lived thirty-six years, and by whom he had seven children; one son and four daughters grew up, married and settled near their parents. During these thirty-six years, by industry, economy and good judgment, an estate worth some $50,000, was accumulated. The evidence shows that the donor was an eccentric man, and his widow testified that he was always a hard man to get along with. In 1868 he seems to have become fascinated with a woman named Nancy Hyatt, with whom he established immoral relations, which fact became known to the public and his family. The wronged wife's remonstrances and entreaties were of no avail in winning back to his family the faithless and unfeeling husband and father. Not content with the injustice already inflicted upon his family, he showed himself utterly insensible to every sentiment of affection and honor by publicly

attacking the chastity of his wife and denying the paternity of all but one of his children.

It is not pretended that there was the slightest foundation for this monstrous slander, and naturally enough a separation ensued, when the property was divided by agreement, the wife and children getting the home farm worth about $8,000. Previous to this strange infatuation with the Hyatt woman, the donor had the respect and esteem of his neighbors, and previous to that time the evidence fails to show that he was not attached to his family. Shortly after the separation, and the division of the property we find him and Nancy Hyatt in Hancock county, Indiana, where, after a residence of only four months, by a fraud on the jurisdiction of the court, he succeeded in having a decree of divorce entered in his favor, and straightway he and the Hyatt woman went through the formality of a marriage. Immediately after this, he and his pretended wife removed to Sumner county, Tennessee, and settled upon a farm, where they separated after having lived together two years.

The money on deposit, it is claimed, was given to the defendant, Basket, a nephew, when no one was present but the alleged donor and donee, and the remainder of the donor's estate all went to other collateral relations. In such a contest, it must not be thought strange if the donee is held to the strictest proof of his title. The outraged wife and children who had a natural claim upon the donor's bounty, will not appeal to a court of equity in vain, unless their adversary has established his right to the money in dispute, by the most convincing testimony.

The allegation of mental unsoundness is not sustained by the evidence—it would be well for the memory of the donor if it were.

These views render it unnecessary to consider other ques-

tions which were argued with ability by counsel on both sides.

Decree that the certificate of deposit be delivered to the complainant, and that the money evidenced by it be paid to him.

MARY ANN SMITH vs. THE AMERICAN BRIDGE COMPANY.

CIRCUIT COURT — NORTHERN DISTRICT OF ILLINOIS — OCTOBER, 1878.

IN EQUITY.

PATENTS—DIES—CHORD BAR HEADS—NOVELTY.—After the art of cutting dies in the face of a trip-hammer, or in the anvil upon which the trip-hammer works, so that articles could be shaped to a given pattern, had been developed, the device of a different pattern in dies for making chord bar heads was not a matter of invention. It lacked novelty.

Banning & Banning, for complainant.

Lawrence, Campbell & Lawrence, for defendant.

BLODGETT, J.—This is a suit brought by the complainant to restrain the defendant from the use of a patent issued to Frederick J. Smith April 5, 1870, for an improvement in dies for making chord bar heads.

The chord bar head is a bar used in the construction of iron bridges. The dies are simply recesses or slots cut in the head of a trip-hammer, or the anvil upon which the trip hammer works, and by the working of the hammer the bar

heads are brought into the desired shape from the joint effect of the dies and hammer blows.

It is simply a hammer with the pattern cut in the face of the hammer and the anvil, so as to fashion the iron to be manipulated under it into the desired shape. The shape required for these chord bar heads is an oval, and it is contended or claimed by this patentee that he has made an improvement in chord bar heads by this process.

There is this peculiarity about the specifications that strikes me as noticeable. The patentee starts out by stating that he has made an improvement in dies for the manufacture of chord bar heads. He then describes the method by which he prepares the iron for making chord bar heads, saying that he commences by shingling scrap iron together, reheating it, and rolling it into a solid bar, and bringing it into the outline of the shape finally wanted. Then he places it under the hammer into which these dies have been cut, and by blows of the hammer, when falling upon the anvil, he brings it into the proper form, and claims that he draws the fiber around the curved portion, so as to make the fiber surround the curved portion of the bar head, and thereby make it stronger. This is the claim which he puts in for making a better bar head, and one which will sustain more weight by many tons than those cut or chucked out in the ordinary way. The die, however, is all that he claims as the patented device, and the question naturally arises, how much of the patentee's improvement results from the better iron which he uses by shingling scrap iron together, and thereby obtaining a better material with which to make his bar heads, and how much is due to the process by which he manipulates the iron in his dies after he has shingled the bars together.

Every person familiar with the making of iron knows that scrap iron, when shingled and reheated and welded together,

makes the toughest iron that is known to the trade, and that it is the process by which the best iron is prepared for the extraordinary services to which it is subjected for many purposes—such, for instance, as railroad car axles, where the very best quality of iron is required. But the feature of this invention which struck me when the case was first presented was, that these dies are old; they have been in use many years, as the proof in this case shows—many years before this man obtained his patent, or claims that he made his invention—for as the proof in this case shows, for twenty years before this man appeared upon the field as an inventor of this device, dies similar to this, except in shape, were used in Colt's Armory at Hartford, Conn., for the purpose of shaping the butts of pistols under the trip-hammer, the die being partly in the anvil and partly in the hammer which fell upon the anvil. So, too, the hammers for pistols were struck under a die in a similar manner; and for many years prior to this inventor's entering the field, dies were used in a manufactory at Cleveland, for striking into shape, irons, in form similar to this, used in making draw-bar heads for railroad cars.

Now, after the art of cutting dies in the face of the hammer and in the face of the anvil, so that articles could be shaped to a given pattern under the trip-hammer, had been so far developed that an ordinary mechanic could, with dies in an anvil and hammer, or in either the anvil or hammer, produce shapes like those draw-bar heads, what possible invention was there in cutting dies of another pattern in your anvil or hammer so as to shape these chord bar heads? It was simply changing the form of the die.

A die which would work, or a hammer and anvil which would work a piece of iron into a draw-bar head, would work one into a chord bar head when you simply changed the form of the die. It seems to me that it is preposterous to hold that a man is entitled to a patent for a

mere device of this kind. It is not an invention of a new die, to change the form of a die so as to make a new shaped article under it. The time may come when it will be desirable to make a chord bar head of different shape from the one which this die makes, and if the principle contended for by this patentee is sound, we should have a new patent for every conceivable new form of die, not only in chord bar heads, but for every other form into which iron can be worked by the aid of dies. There is certainly nothing new in this device — there is no novelty in the mere change of form of the die, so as to change the form of that which is manipulated under the die.

The bill will be dismissed.

MALCOLM C. TURNER *et al.* vs. THE INDIANAPOLIS, BLOOMINGTON & WESTERN RAILWAY CO. *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA AND SOUTHERN DISTRICT OF ILLINOIS—OCTOBER, 1878.

IN EQUITY.

1. RECEIVER OF RAILROAD—ALLOWANCE OF "BACK" CLAIMS.—The court can require the receiver of a railroad to pay the claims of operatives and supply-men, owing at the time of his appointment, and even to hold the property subject to them; not as a lien on the road but in the exercise of the equitable discretion of the Court.

2. TIME WITHIN WHICH CLAIMS ARE ALLOWED.—In fixing a time within which such claims will be allowed and ordered paid, the Court will adopt by analogy the rule of the state statutes in relation to liens on railroads for work done, and supplies and materials furnished.

Shortly after the Federal Courts in this circuit took possession, by receivers, of railroads in foreclosure proceedings, a policy was adopted of requiring the payment by them of what were called "back" claims for materials, labor and supplies, out of the income, and sometimes, in case of sales of the railroad property under decree, out of the proceeds. This had been the practice in this court for several years.

In the present case this policy was attacked, and the court was requested to reconsider its rulings.

The different questions involved in the action of the court were elaborately argued by *J. D. Campbell*, *R. E. Williams*, *Ashbel Green*, *J. Augustus Johnson*, *G. W. Parker*, *Charles W. Fairbanks* and *Benjamin Harrison*, for the different mortgagees.

And by *John M. Butler*, *Samuel M. Harrington*, *A. J. Gallagher* and *W. A. Ketchum*, for the labor, supply, and material claims.

DRUMMOND, J.—I will state some of the reasons which have caused the court to adopt the practice which exists in this circuit, in relation to materials and supplies which have been furnished railways, and labor performed on them, when they are placed in the hands of receivers by the court.

The question is important, because there have been within a few years numerous railways in this circuit operated by receivers, the annual income of which is many millions of dollars.

It will be borne in mind that in all cases where a foreclosure has been sought by the bondholders, the mortgages provide that the after-acquired property shall be bound by the mortgage, and it has been decided by the Supreme Court that such a contract overrides any judgment obtained against

the railway company and execution issued, even as to personal property coming into possession of the company before judgment and execution.

The railways do not come within the control of the court until after default on the bonds or coupons, and generally after absolute insolvency. There are, therefore, when application is made to the court for the appointment of a receiver, in all cases large balances due to operatives, and for supplies and materials furnished. There are also contracts running with other railways, upon which balances are due, and which contracts must often be continued in force in order to preserve the security of the mortgagees. The receiver takes the road with the benefits accruing from such contracts, and uses any supplies or materials which are on hand and not paid for. It therefore early became a question in this species of litigation what rule should be adopted by the court as to such claims against railway companies. A very simple way to dispose of the question was to take the railway at the time it came into the possession of the court, pay for all work done and supplies furnished thereafter, and refuse to pay any debts so incurred before. But that seemed impracticable. It was not like an ordinary mortgage on a farm or a house. A railway is matter of public concern. It is one of the great instruments of modern commerce between states and nations. The public as well as private interests require its continual operation. To refuse to pay anything whatever for past services or supplies or materials has never, it is believed, been attempted by any court, or even demanded by any mortgagee. The receiver goes into the possession of the railroad with all its appliances and instrumentalities, with its men at work on the track or running the trains, with its coal, oil, tools and other means of operating the road. The mortgagees have come into court asking it to assume possession of the road to protect their interests. Are the interests of

all others, operatives and supply-men who happen to have claims against it at the time to be absolutely ignored in the case of insolvent companies? I think not.

The appointment of a receiver is, to a great extent, a matter of discretion in the court, and it has been thought that the court might require the receiver to pay certain of these claims, and even to hold the property subject to them; not as a lien on the road, but in the exercise of the equitable discretion of the court in dealing with property which is of a peculiar character, and under circumstances of which the past history of litigation affords no example or precedent.

What should be included within the claims to be paid has also been the subject of consideration, and the practice has been to allow all to be paid that could be fairly regarded as a part of the actual operating expenses of the road, whether for labor or supplies, in their various forms. It being conceded that *some* claims for past services should be paid, the next point to be determined was, what limitation, if any, as to time should be placed upon such payment. It was found in many cases that those who had control of the railways, instead of paying the current operating expenses of the companies would postpone the payment of the same, sometimes for many months, in favor of the interest due on the mortgages, which they would discharge, in the hope, apparently, that a more favorable time in the business of the roads would enable them to make up the deficiency. It was in view of this and similar considerations growing out of the actual condition of affairs, and of the absolute necessity of fixing some reasonable time within which such claims should be allowed, that the court adopted, as by analogy, the rule of the statute of Illinois, in relation to liens on railroads for work done, and supplies and materials furnished. During the discussions which have taken place on this subject, the allowance of these "back" claims has been sometimes called a lien, but,

in point of fact, it never has been, nor can it be, justly so considered, but, as already stated, as an exercise of the equitable power of the court in the premises.

It is but fair to say, in the numerous cases which have come before the court, its rulings upon this subject have been generally acquiesced in by the counsel of the mortgagees.

The magnitude of the claims in this case is such as perhaps to cause hesitation in following the rule which has been heretofore established, and makes it desirable to obtain from the Supreme Court a decision which shall announce some just principle that may be a guide in these and similar cases.

While it has been generally admitted that the court had a discretionary power in the direction indicated, to disburse the earnings of the road, it has been insisted that these claims should not be considered binding on the property in case of foreclosure and sale.

The view that has been taken of that branch of the subject has been this: In general, when the mortgagees have come before the court to ask for the appointment of a receiver, the property has been in a very dilapidated condition, the rails nearly worn out, the ties needing replacement, the rolling stock, station houses and bridges, repairs—the whole property being in a condition to render the transit of persons and merchandise dangerous. The practice has therefore been, instead of immediately directing the receiver to pay for labor or supplies or materials previously furnished, to expend the receipts in repairs of the road, in the purchase of new iron or of steel, and of rolling stock, and in the construction and repair of side tracks, bridges, station houses, etc., thus adding to the security of the mortgagees by enhancing the value of the property. It has been thought that under the same equitable discretion which has been heretofore referred to, this gave the operatives and material-men a just claim upon the property itself. It has not unfrequently happened that

railroads which were comparatively worthless when they came into possession of the court, have become under its administration valuable property.

It is for these and other like reasons that the court in the appointment of receivers in all cases of railroads in this circuit has required them, either at the time of such appointment, or as being so understood then, by subsequent order, to pay for labor performed, or supplies or materials furnished during the time indicated. The court has always treated this kind of property as including in the security given to the mortgagees not only real and personal estate in the ordinary sense, but franchises and intangible property.

The experience of the court which, it may be said, has been obtained by the management for many years of immense amounts of this kind of property, has satisfied it that practically, it would be well nigh impossible, looking at things as they actually exist, to operate the roads by receivers without some allowance for claims of the character mentioned, existing at the time of their appointment, and that the limitation already stated is not an unreasonable one, in view of all circumstances.

The conclusions and practice of the court stated in this opinion were substantially sustained, subsequently, by the Supreme Court of the United States, in *Fosdick vs. Schall*, 99 United States, 235. [*Reporter.*

Ex parte WEIMER AND REYNOLDS.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—NOVEMBER, 1878.

1. EFFECT OF PARDON.—The recital of a specific, distinct offense in a pardon by the President limits its operation to that offense, and such pardon does not embrace any other offense for which separate penalties and punishments are prescribed.

2. A pardon from sentence for conspiracy to defraud the revenue, does not entitle the defendant to demand cancellation of a judgment of forfeiture for fraud upon the revenue.

Murphey & Goodwin, for petitioners.

J. C. McKenney, for United States.

DYER, J.—On the 23d day of June, 1875, an information was filed in the District Court against certain property of the petitioner Weimer, situated in his rectifying house in Milwaukee, and the property was seized for condemnation. The causes of forfeiture as alleged in the information arose from violations of various sections of the Revised Statutes relating to such frauds upon the revenue as distinctly involve forfeitures of property.

In this proceeding, Weimer appeared as claimant and filed an answer to the information. After the seizure, he gave bond to answer for the property, to the extent of its appraised value, which was $1,346.25, and subsequently such proceedings were had in the forfeiture case, that the property was condemned as forfeited, and on the 2d day of March, 1876, judgment was entered against Weimer, and the stipulators in the bond for the amount of the bond, namely, $1,346.25 and costs, which judgment remains unsatisfied of record.

On the 20th day of July, 1875, Weimer was indicted with one John S. Taft, a revenue gauger, under Section 5,440 of the Revised Statutes, for a conspiracy to defraud the United States of the tax on distilled spirits then being in the rectifying house of Weimer, upon which the tax had not been paid, which conspiracy was alleged to have been formed and carried into effect in April, 1875.

To this indictment there was a plea of not guilty. Upon trial, the defendants in the indictment were convicted, and Weimer was sentenced to pay a fine, and to imprisonment. While suffering such imprisonment pursuant to the sentence, he was pardoned by the President.

The case of the petitioner, Reynolds, was this: On the 1st day of May, 1875, certain property situated in the rectifying house of the petitioner and his partner, Burbach, was seized as forfeited to the United States. Subsequently, an information was filed against the property, in the District Court, the alleged causes of forfeiture set forth in the information, being substantially identical with those recited in the information in the case of Weimer. Burbach & Reynolds appeared in the proceeding as claimants of the property, gave bond for its appraised value and filed an answer. Subsequently, decree of forfeiture and condemnation was rendered, and judgment against Reynolds and the stipulators in the bond was entered for $2,944.92 and costs, which judgment is unsatisfied of record.

On the 20th day of July, 1875, Reynolds was indicted with Burbach and Taft for conspiracy, under section 5,440. Upon trial of the defendants in the indictment, there was a conviction, and Reynolds was sentenced to pay a fine and to imprisonment. While the sentence was being executed, he was pardoned by the President, and discharged from further imprisonment.

The parties, Weimer and Reynolds, now present their sepa-

rate petitions setting forth the foregoing facts, and ask the court, because of the pardons granted to them in the criminal cases, to direct that satisfaction of the judgments in the forfeiture cases be entered.

Counsel for petitioners contend that as a consequence of the pardons, and by operation of law, the judgments in question became extinguished, and that their cancellation of record should be ordered by the court. Their argument is, that the pardons extend to and remit to the petitioners all penalties and all forfeitures of property which are denounced by any law of the United States, as a consequence of any crime or misdemeanor committed by the petitioners, at any time anterior to the date of the pardon, unless saved by exception appearing on the face of the pardon itself.

I cannot concur with counsel in giving to the pardons in these cases so broad a construction. The pardons recite the offense of which petitioners were convicted, namely, conspiracy to defraud the United States of the tax on distilled spirits, which recital is followed by a declaration of pardon. Now, though it be true that a full pardon is granted in each case, it is a pardon only of the offense specified in the preceding part of the instrument. The offense of conspiracy to defraud the United States, is entirely distinct from every other offense under the revenue laws, for which specific penalties and punishments are prescribed. The offense of conspiracy may be pardoned, and yet the offender may be liable to have his property forfeited because of other violations of law which do not constitute a conspiracy. Counsel for petitioners construe the pardons as if they had, in terms, pardoned all offenses, against the laws of the United States, which have any reference to the statutes relating to internal revenue. If such a general pardon could be sustained, it is clear that none such has been granted in these cases.

Concerning the general effect and operation of a pardon,

there need be no dispute. The language of the opinion in *Ex parte Garland*, 4 Wallace, 380, is clear and full upon that question: "A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction, from attaching; if granted after conviction it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."

It is to be borne in mind, however, that the offense here spoken of, is the precise offense of which the offender is pardoned, and none other. The punishment, penalties and disabilities referred to, are such as result from the identical offense of which the person is, in the eye of the law, by virtue of the pardon, made innocent. The restoration to former rights is commensurate only with the scope of the pardon, as it relates to the offense in the particular case.

Now, undoubtedly, the President may remit forfeitures and penalties. Judge STORY was of opinion that the power of pardon was so general and unqualified that the power to remit fines, penalties and forfeitures was included in it.[1]

But in the present cases the President did not in terms, nor as I think, in legal effect, make such a remission. He only pardoned a distinct offense, specifically described in the instrument of pardon, and such a pardon cannot embrace any other offense for which separate penalties and punishments are prescribed.

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[1] Story on the Constitution, Section 1,504 and note. See, also, *Osborn vs. United States*, 1 Otto, 474.

Several cases decided by the Supreme Court of the United States, bearing upon the effect of a pardon, are cited upon the brief of counsel, as sustaining the present applications.

In the case of *Garland*, 4 Wallace, 333, it was held that the pardon received by the petitioner restored him to his civil rights, including a previously acquired right to appear as an attorney and counselor in the Federal Courts. But the pardon, in terms, was "for all offenses by him committed, arising from participation, direct or implied, in the rebellion;" and it was held that the effect of such a pardon was to relieve him from all penalties and disabilities attached to the offense of treason. So, in the case of *Armstrong's Foundry*, 6 Wallace, 766, in which it was held that the pardon granted to the party, relieved him from forfeiture of property employed in aid of the rebellion, the pardon was of all offenses, and the consent of the owner to such use of his property was an offense, the penalty for which was forfeiture.

Again, in *Osborn vs. United States*, 1 Otto, 474, in which it was held, that the effect of the pardon in that case, was to restore to its recipient all rights of property lost by the offense pardoned, unless the property had, by judicial process, become vested in other persons, subject to such exceptions as were prescribed by the pardon itself, the pardon was as comprehensive in terms as in the cases previously noticed, and the decision is placed on the ground that the pardon covered the identical offenses for which a forfeiture of property had been decreed. So, again, in *Knote vs. United States*, 5 Otto, 149, the pardon was general, with an express restoration of all rights under the Constitution and laws.

It is clear that these adjudications do not sustain the construction placed by counsel upon the pardon in the cases at bar. The principle established by these decisions, is, simply, that a pardon releases an offender from the consequences of the offense pardoned, and from the disabilities imposed by

that offense. In other words, the penalties and forfeitures from which the person is released by a pardon, are such as accrue from the particular offense or offenses embraced in the instrument of pardon. To affirm the doctrine urged in behalf of the present petitioners, is to say that though a pardon in terms and evident intent, only relieves its recipient from punishment for the offense therein named, nevertheless, in legal effect, it grants a release from the consequences of all offenses committed anterior to the date of the pardon, whatever may have been their nature, and however foreign to that which is expressed in the instrument of pardon. Such a view of the scope and effect of the pardons in the cases under consideration, is not maintainable.

The application of petitioners is denied.

Mr. Justice HARLAN concurred in the views expressed in this opinion.

As to the effect of a pardon, see, also, *United States vs. Cullerton*, *ante*, page 166.

B. LEIDERSDORF *et al.* vs. J. G. FLINT.

CIRCUIT COURT — EASTERN DISTRICT OF WISCONSIN — NOVEMBER, 1878.

IN EQUITY.

1. TRADE MARKS — CONSTITUTIONAL LAW. — The legislation by Congress upon the subject of trade marks, of July 8, 1870, is unconstitutional.
2. It cannot be sustained under the power to legislate in favor of authors and inventors, nor under the power to regulate commerce.

Winfield Smith, for complainants.

Jenkins, Elliott & Winkler, for defendant.

DYER, J.—This is a bill for an injunction to restrain an alleged infringement by defendant of complainant's trade mark, used upon packages of tobacco and registered according to act of Congress. Both complainant and defendant are citizens of Wisconsin, and the bill is based upon that provision of Section 4,942 Revised Statutes, which gives to the party aggrieved by the wrongful use of his trade mark, a remedy by injunction, according to the course of equity, in any court having jurisdiction over the person guilty of such wrongful use, and is filed upon the theory that this court has jurisdiction to entertain such a bill, though both parties are citizens of the same state.

The bill is demurred to, on the ground that the court has no jurisdiction, and the demurrer raises the question of the constitutional power of Congress to legislate upon the subject of trade marks.

The question is of great importance, and appears to be

new, since, with the exception of *Duwell vs. Bohmer*, 10 Chicago Legal News, 356, we were referred upon the argument to no reported case in which it has been determined.

The statutory provisions relating to trade marks are contained in Title 60, Revised Statutes, which is entitled "Patents, Trade Marks and Copyrights." They authorize the registration of trade marks, impose restrictions upon such registration, and confer certain remedies for the protection of the rights of parties who have complied with the requirements of the statute. The remedies thus given are mentioned in Section 4,942, which provides that "any person who shall reproduce, counterfeit, copy or imitate any recorded trade mark, and affix the same to goods of substantially the same descriptive properties and qualities as those referred to in the registration, shall be liable to an action on the case for damages for such wrongful use of such trade mark, at the suit of the owner thereof; and the party aggrieved shall also have his remedy, according to the course of equity, to enjoin the wrongful use of his trade mark, and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful use."

The only clause in the Constitution from which it can be well claimed Congress derives its power to legislate upon the subject, is Article 1, Section 8, Clause 8, which authorizes Congress "To promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." If the power in question is given by this clause of the Constitution, then, inasmuch as by Section 629 of the Revised Statutes, the Circuit Courts are invested with original jurisdiction of all suits at law or in equity arising under the patent or copyright laws of the United States, and in view of the act of Congress of March 3, 1875, which con-

fers jurisdiction in all civil causes arising under any law of the United States, where the amount in dispute exceeds $500, and of the provisions of Section 4,942, Revised Statutes, above referred to, there is ground for claiming that the courts of the United States have jurisdiction in suits which involve the right to trade marks without regard to the citizenship of parties.

But, in contending that the power to legislate upon the subject of trade marks is derived from the constitutional provision before cited, it must be necessarily assumed that the maker of a trade mark is an author or inventor, and that a trade mark is a writing or discovery within the meaning of that clause.

Argument can hardly be needed to demonstrate that a law regulating trade marks is not, in any just sense, a copyright law. The general meaning of the term copyright, is an author's exclusive right of property in the work which he produces. It includes the right of the citizen who is an author of any book or writing, any literary, dramatic or musical composition, any engraving, painting, drawing, map, chart or print, and of models or designs intended as works of art. It is something which appertains to authors who, by their writings and designs, promote the advancement of literature, science and the useful arts. An author, by standard definition is "one who produces, creates or brings into being; the beginner, former or first mover of anything; hence, the efficient cause of a thing. The term is appropriately applied to one who composes or writes a book" or writing, "and in a more general sense to one whose occupation is to compose and write books" or writings.

So, too, invention implies originality. Originality, not mere mechanical dexterity, is the test of invention.[1] It is

[1] *Blake vs. Stafford*, 8 Fisher, 305.

the "finding out, the contriving, the creating of something which did not exist, and was not known before, and which can be made useful and advantageous in the pursuits of life, or which can add to the enjoyments of mankind."[1] To entitle one to the character of an inventor, he must himself have conceived the idea embodied in his improvement. It must be the product of his own mind and genius.[2]

The dissimilar characteristics of trade marks, and copyrights, and inventions for which patents may be granted, have been pointed out or illustrated in various adjudicated cases. A trade mark has been very well defined as one's commercial signature to his goods. It may consist of a name, symbol, figure, letter, form or device, if adopted and used by a manufacturer or merchant in order to designate the goods he manufactures or sells, to distinguish the same from those manufactured or sold by another, so that the goods may be known in the market as his, and to enable him to secure such profits as result from his reputation for skill, industry and fidelity.[3]

The basis of a trade mark right is primarily the encouragement of trade. As the court, in discussing the subject, say in *Partridge vs. Menck*, 2 Barbour's Chancery R., 101, the question in such a case is not whether a person was the original inventor or proprietor of the article made by him and upon which he puts his trade mark, nor whether the article made and sold by another under his trade mark is an article of the same quality or value. But the court proceeds upon the ground, that the complainant has a valuable interest

[1] *Conover vs. Roach*, 4 Fisher, 16; *Ransom vs. Mayor of New York*, 1 Fisher, 265.

[2] *Pitts vs. Hall*, 2 Blatchford, 234.

[3] *McLean vs. Fleming*, 6 Otto, 245; Upton's Trade Marks, 9; *Taylor vs. Carpenter*, 2 Sandford's Chancery Reports, 604.

in the good will of his trade or business, and that having appropriated to himself a particular label or sign or trade mark, indicating that the article is manufactured or sold by him or by his authority, or that he carries on his business at a particular place, he is entitled to protection against any other person who pirates upon the good will of his customers or of the patrons of his trade or business, by sailing under his flag without his authority or consent.

The name, word, mark, device, or symbol constituting a trade mark may be devoid of novelty, originality, and of anything partaking of the nature of invention. As the Supreme Court say in *Canal Company vs. Clark*, 13 Wallace, 322, "undoubtedly words or devices may be adopted as trade marks, which are not original inventions of him who adopts them. Property in a trade mark, or rather in the use of a trade mark or name, has very little analogy to that which exists in copyrights, or in patents for inventions. Words in common use, with some exceptions, may be adopted, if at the time of their adoption, they were not employed to designate the same, or like articles of production." So in *McLean vs. Fleming*, 6 Otto, 245, it is said that trade marks are not required to be new, and may not involve the least invention or skill in their application or discovery.

As is well shown by a writer who has with evident care collated the authorities on the subject, Vol. 7, Central Law Journal, 143, the foundation of title to a trade mark is priority of adoption and actual use in trade, and it neither in application nor discovery necessarily possesses the elements of originality, novelty or invention.

"The power given to Congress to promote the progress of science and useful arts, is restricted to the rights of *authors* and *inventors*, and further, their rights are only to be secured for a *limited time*."[1]

[1] *Livingston vs. Van Ingen*, 9 Johnson, 566.

This limitation in time is imposed by the constitutional provision itself. But the right to a trade mark is of common law origin, and as a common law right, it is limited only by the period of its use, and ceases only with its abandonment. Property in inventions and discoveries did not exist at common law, and for their protection we have to look wholly to the constitutional provision on the subject.

The consideration for which a grant is made by the public to the author of a new and useful invention, of an exclusive right, is the benefit resulting to the public from the invention. The consent of the inventor to make his invention known and available to others, and ultimately to give it to the public, constitutes the consideration for which he is entitled to receive protection from the Government in the form of the grant of an exclusive right.[1] Not so with trade marks. For when the exclusive right to use a trade mark terminates, no corresponding benefits result to the public. Its value is gone when it ceases to be exclusive and becomes the property of the public.

Mr. Browne, in his Treatise on Trade Marks, says, p. 75: "The rights of inventors and authors, as long settled in Great Britain, were familiar to the framers of the Constitution;" and, as Mr. Justice STORY says: "It is doubtless to this knowledge of the common law and statutable rights of authors and inventors that we are to attribute the constitutional provision. It was beneficial to all parties that the national government should possess this power; to authors and inventors, because, otherwise, they would have been subjected to the varying laws and systems of the different states on this subject, which would impair, and might even destroy, the value of their rights; to the public, as it would promote the progress of science and the useful arts, and admit the

[1] Curtis on Patents, preface.

people at large, after a short interval, to the full possession and enjoyment of all writings and inventions, without restraint. In short, the only boon which could be offered to inventors to disclose the secrets of their discoveries, would be the exclusive right and profit of them, as a monopoly, for a limited period."

A copyright is limited by time, a trade mark is not. A copyright is limited territorially, but a trade mark acknowledges no boundaries. They are unlike in their natures.

In every aspect suggested, and in other respects which might be suggested, it would seem that the analogy between property in the use of a trade mark and a patent for an invention, and between a trade mark right and a copyright fails. Property in a trade mark exists independently of statute. It is otherwise with inventions and discoveries. As is said by the court in *Rodgers et al. vs. Philp et al.*, 1 Official Gazette, 31, they "are protected only in consequence of the constitutional provision on the subject, which does not apply to trade marks."

Considering with care the important question involved, and not unmindful that the question, whether a law be void for repugnancy to the Constitution, or for want of constitutional authority to enact it, is at all times one of much delicacy, I am constrained to hold that legislation by Congress upon the subject of trade marks, is not authorized, either by the letter or spirit of the constitutional provision from which such authority is sought to be deduced. The maker of a trade mark is neither an author nor an inventor, and a trade mark is neither a writing nor a discovery within the meaning and intent of the constitutional clause in question.

It may be added, that the constitutionality of the trade mark statute cannot be sustained under the clause which gives to Congress the power to regulate commerce among the several states, nor, in my opinion, under any of the pro-

visions of the Constitution which prescribe the legislative powers of Congress.

From these views, it follows that this court is without jurisdiction to entertain the present controversy, which, as before stated, is between citizens of the same state.

Demurrer to bill sustained.

In this opinion Mr. Justice HARLAN, who sat at the hearing, concurs.

The principle laid down in this decision was affirmed by the Supreme Court of the United States in *The United States vs. Steffens*, 10 Otto, 82. [*Reporter*.

EDWARD HEERMAN vs. BEEF SLOUGH MANUFACTURING, BOOMING, LOG DRIVING AND TRANSPORTATION COMPANY *et al.*

CIRCUIT COURT—WESTERN DISTRICT OF WISCONSIN—DECEMBER, 1878.

IN EQUITY.

1. RIVER COMMERCE—STATE LEGISLATION—CONSTITUTIONAL LAW.—Until Congress assumes control of the commerce of a river, the state within whose boundaries such river wholly lies, may by legislation authorize a company to maintain piers, dams and booms in the river for logging purposes, even though they may interfere with the navigation of the river.

2. ULTRA VIRES.—And if such company exceed its corporate powers in placing such obstructions in the river and in running logs, it is not for a Court of Equity, at the instance of a private individual to declare such improvements a nuisance; or regulate the subject by injunction or other decree.

3. EQUITY JURISDICTION.—If any person or class of persons pursuing lawful branches of commerce, take or exercise a too exclusive or unreasonable use or possession of the river, to the injury of other persons, the law affords an adequate remedy in damages, and a court of equity will not interfere.

4. CHIPPEWA RIVER — PUBLIC HIGHWAY.—The public have a right to use the Chippewa river, in Wisconsin, as a highway for the transportation of logs and lumber. Such right is common to all, and is recognized and protected by the courts.

5. It is the peculiar province of the Legislature to determine whether or not the benefit to the logging interest and to general commerce, accruing from the erection of such piers, dams, etc., and the running of logs, would more than counterbalance the hindrance to steamboat navigation which their use would necessitate; and the courts will not interfere to enjoin that which the law authorizes.

This action was brought by the plaintiff, a resident of Minnesota, and the proprietor of certain steamboats engaged in the navigation of the Chippewa river, in Wisconsin, against the defendants, two corporations existing under the laws of Wisconsin, to restrain and prohibit them from running loose logs in the Chippewa river, and to compel them to remove therefrom certain piers, booms and dams, placed therein by the defendants to aid and facilitate the running, driving and storing of logs, on the ground that such piers, booms and dams, and the running and driving of logs in said river, constitute an obstruction to navigation, and are therefore a nuisance which ought to be abated and perpetually enjoined by the decree of this court.

The case was heard upon a general demurrer filed by the defendants to the plaintiff's bill of complaint.

The allegations which are essential to a proper understanding of the case, were in substance as follows:

That the Chippewa river, for one hundred miles above its mouth, is a navigable highway and water of the United States, leading into the Mississippi river, and an avenue of commerce between the state of Wisconsin and other states of the

Union, for conveying, by ascending navigation, the products of other states and countries, with boats and barges, and for conveying the products of this state, by descending navigation, with boats, rafts, etc., to markets outside of the state; and that the said river has been so used for the past thirty years, and has been recognized by the Congress of the United States as a public highway and navigable stream.

That appropriations were made by Congress in 1874 and 1875, for the purpose of making examinations and survey of the stream; that such surveys were made and approved by the United States, and public improvements on the river have been begun.

That the plaintiff for twelve years has been engaged in steamboating on said river between its mouth and the city of Eau Claire, at the head of navigation.

That the defendant, the Beef Slough Manufacturing, Booming, Log Driving and Transportation Company, is a joint stock corporation, organized in the year 1867, under Chapter 73 of the Revised Statutes of Wisconsin, for the declared purpose of driving and booming logs, manufacturing lumber, doors, etc., on and at the head of Beef Slough, on the Chippewa river.

That before 1870, the said defendant company constructed in said river, and on Beef Slough, which is one of the channels of the river, without any lawful authority, a number of piers of wood and stone of great size and strength, and connected the same by booms placed in the river, in such manner as to cause a considerable obstruction to the navigation of the river, and so as to divert, to some extent, the waters from the main channel into said Beef Slough; that afterwards, in the year 1870, the Legislature of Wisconsin passed an act entitled "An act to define certain rights and duties of the Beef Slough Manufacturing, Booming, Log Driving and Transportation Company," known as chapter 299 of the

Private and Local Laws of 1870, by which the state attempted to authorize the said company to maintain the said piers and booms constructed for the purpose of turning loose logs, floating in said river, into Beef Slough, and to construct and maintain in Beef Slough, and upon the land owned and leased by said company, such piers, dams and booms as might be necessary to confine the water of said slough to its proper channel, and to secure the logs running into the same: *Provided*, That no booms, dams or piers should be constructed which should prevent the free and unobstructed passage by boats through Beef Slough, or from Beef Slough into Perrin Slough, so-called; and, *provided, further*, if within eighteen months from the passage of said act, good and sufficient provisions were not made for the free and unobstructed passage aforesaid, then the privileges granted by said act should cease; and the said company were required to pave and stone the bed of said Beef Slough at or near its connection with said Chippewa river, for the purpose of maintaining the level of said bed and preventing an excess of the volume of water flowing over the same; and whereby it was provided that said company should have the exclusive privilege of driving and booming all logs, timbers, railroad ties and fence posts, which might run into Beef Slough, until the same should have been delivered to the owners thereof below the main rafting boom of said company, which was situated near the mouth of said Beef Slough; and whereby it was provided that said company should have the right to charge for driving from their booms, at or near the head of said Slough in the Chippewa river, and for booming and delivering, as aforesaid, such logs, timber, railroad ties and fence posts, at certain specified rates.

That the said Beef Slough is in fact a navigable branch of said Chippewa river, and departs from the main channel about eighteen miles above the outlet of said Slough into

the Mississippi river, flowing into the latter river about nine miles below the mouth of the main Chippewa, and is, in its greater portion, navigable for boats, barges and rafts, and a considerable portion thereof was so advantageously used before the unlawful obstruction thereof by said defendant; that at all times prior to the obstruction of the same by said defendant, the main and natural channel of said river flowed to the south of Beef Island, and the same was the principal navigable channel of said river prior thereto, and such channel was known and called by the name of the river.

That upon the north side of said Beef Island there is a channel known as Horse Slough, which is of greater length and more circuitous than the river aforesaid, and which, prior to said obstructions being placed in the main river, while possible to be navigated in seasons of high water, was not commonly employed in navigation by either steamboats or rafts.

That the defendants, with the intent and design to obstruct the navigation of said Slough and river, and to secure the gains and profits of tolls, have, without any authority of law, erected, since 1870, large wood and stone piers in such manner as to have entirely blocked up and obstructed the original and natural navigable channel of said river, and also Beef Slough to such an extent as to have entirely prevented the passage of steamboats, barges and rafts therein; and have erected and constructed in said Beef Slough other piers, booms and dams in such manner that they have taken exclusive possession thereof and entirely prevented any navigation or use thereof by the public, including the plaintiff, by boats, barges, steamboats or otherwise, and give out and threaten that they will henceforward continue so to do.

That in the year 1869 or 1870, the defendant, the Beef Slough Company, without any authority of law, entered upon the business of cutting, in the winter season, upon lands

situated upon the head waters of the Chippewa river, pine logs and timber, and casting them upon the waters of said river to be floated by force of the current during spring and early summer, down the said river for the distance of about one hundred and fifty miles, to the booms of said company at Beef Slough.

That for the purpose of securing some colorable right to such operations, the defendant, the Chippewa River Improvement and Log Driving Company, was organized by articles dated the first day of February, A. D. 1876, for the purpose of driving and transporting logs and timber from the upper waters of the Chippewa and tributaries to and into Beef Slough, and to improve said Chippewa river and its tributaries, by constructing dams and piers, booms, levees, dykes, cut-offs and such other structures, in such other streams as might be deemed necessary to insure or increase the facility of such streams for the running, floating or driving of logs or timber, with power to charge and receive a reasonable sum by way of compensation on the logs or timber so run or floated.

That the effect of such acts and business of the defendants has been and will be to render the navigation of said river, during those portions of the year when navigation from natural causes is the best, exceedingly difficult, dangerous and expensive.

That the course of the operations of the said defendants has been and will be to cover the surface of said stream with logs floating down the same in great masses, so that the entire channel of the river has been, and will hereafter be, occupied by them during the period of several weeks in the spring months, and for many weeks during the rise of the water in summer. And such logs have been and will be left, wholly unguided, to run as the course of the current directs, and generally to float with the rapid motion, and by

reason of the numbers in which they have hitherto been placed in said river, they have a force much superior to that of single logs, and sufficient to crowd out to one side floating vessels with which they come in contact, by reason of which, it has hitherto happened, and must happen in the future, that the steamboats of the plaintiff have been much impeded and much delayed in navigation by day, have been oftentimes broken and seriously damaged in their wheels, and have been compelled to entirely suspend their course by night, and to tie up to the bank to escape the dangers threatened by such running logs; and the amount of navigation has been greatly diminished, and must hereafter continue to diminish until the same shall cease, unless the use of such river for such purposes be restrained.

That the floating of logs as aforesaid on said river has caused great and permanent injury to the navigability of the stream, by striking against and breaking down the banks thereof, and thereby widening the river in some places, and making it shallow and less navigable.

That the plaintiff has often been compelled to suspend, for a considerable number of hours at a time, the running of his boats, especially by night, in consequence of the danger from running logs, imposing large expense upon him; and on different occasions the rudders, wheels, log chains and guards of his boats have been broken and rendered unserviceable in consequence of said logs running in said river; that twice the plaintiff's barges have been sunk by reason of the running logs, and that damages have in various ways been inflicted upon him, exceeding in amount the sum of six thousand dollars; that said defendants have, during the spring of 1878, made a boom at the head of Beef Island which extends across the main and only practicable channel of the said Chippewa river in such a manner that no boats

can safely pass up or down said river unless said boom be opened or taken away.

That the ostensible purpose thereof is to turn floating logs into Beef Slough, but the same is unnecessary for such purpose, but the real object and effect of the same is to divert a larger volume of said water into said slough, and the effect of such boom will be to divert the waters to a great extent into Beef Slough, so as to practically destroy steamboat navigation on said river, and also to form a sand bar across the main channel of said river and effectually block up the same against the passage of boats. And the said defendants have constructed ten or twelve sheer booms in said river in such manner as to endanger the passage of steamboats, the same projecting far into the stream, and kept without a light or any man upon them, whereby the hulls of steamboats ascending said river are in great danger of being struck and punctured, and boats are often seriously injured and delayed in the effort to pass the same; and that at Round Hill the defendants have built a boom, more than a third of a mile in length, so as to have entirely cut off the former channel at that point and to cause the same to fill with earth and sand, and in extension thereof have built a sheer boom of such length that the same can be extended entirely across the river; and in entire disregard of the rights of the plaintiff, the said defendants frequently carry and extend the same so as to leave but a single, narrow, deficient, and dangerous passage between said boom and the opposite bank.

That the defendant, the Chippewa River Improvement and Log Driving Company, aided and abetted by the defendant, the Beef Slough Company, have, during the summer of 1878, constructed on the Chippewa river, at Little Falls, a large dam, entirely across said river, sixteen feet in height, at a point where, by reason of the low surface of the country

above, on the banks of said river, such dam will cause a very wide overflow and back-set of the water.

That said dam has been constructed solely for the purpose of gathering a reservoir or supply of water sufficient to float the logs of said defendants at any season of the year, when the volume of water in said river would not naturally be sufficient in its ordinary flow, and that said defendants give out and threaten that they will, at any time in the year, when they desire for the convenience of their log driving, entirely shut said dam and stop the flow of water in said river until the said dam shall be filled, and will then let it off in such quantities as shall be convenient to them to drive logs therewith; that for such purposes the said dam is constructed with thirty-two gates, to enable the defendants to regulate the escape of water for their convenience; that when the same is closed, there is not water enough left in the Chippewa, below Eau Claire, to enable steamboats or barges to be employed; that on October 29, 1878, said defendant, the Chippewa River Improvement Company, without any previous notice, closed their said dam and kept the same closed for a period of seven days, and thereby two steamboats of the plaintiff, which were then in said river, were left without sufficient water to navigate upon, and ran aground and were injured, and were compelled to suspend their regular trips for a period of seven days, to the great damage of the plaintiff. And again, on the 8th of November, the defendant again closed said dam and shut off the water for five days, with similar effect, and by means of said stoppages plaintiff suffered one thousand dollars damage. And the defendants give out and threaten that they will hereafter continue to stop the water of said river to suit their convenience, from five to eight days at a time.

And the plaintiff prayed that the defendants be perpetually enjoined from the running of loose logs in the river,

and that the court will adjudge such piers, booms and dams to be a nuisance, and that the same be abated, and that the defendants be required to remove the same and restore the said river and slough to their original condition.

L. S. Dixon and *Vilas & Bryant*, for complainant.

Thos. Wilson and *Gregory & Pinney*, for defendants.

BUNN, J.—The demurrer raises the question whether, upon the facts alleged, the court can make a decree granting the relief prayed for.

We think it cannot.

The bill of complaint seems to be framed upon the theory that the Chippewa river being navigable for steamboats as well as for the purpose of floating saw logs to market, there is something peculiar and sacred under the Constitution and laws of the United States and the State of Wisconsin, about steamboat navigation, that should give it the preference over and entitle it to the protection of the law against this other form of commercial enterprise. And no doubt, if Congress, by virtue of the commerce clause in the Constitution, should at any time assume legislative jurisdiction and control of the navigation of the Chippewa river, as it may at any time do, that body could subordinate the logging interest to that of steamboat navigation, or might prohibit the use of the stream for such purpose altogether. Under the authority to regulate commerce, its power is supreme whenever it shall see fit to exercise it. But until Congress assumes to control the commerce of the river, I take it to be clear law that, as to those streams which lie wholly within the territory of a state, though approachable by other streams from other states, as in this case from the Mississippi river, the state within whose boundaries such river lies, may legislate in reference to its commercial use as a public highway; and

such has been the uniform practice throughout the country. This doctrine was first settled by the Supreme Court in the case of *Wilson vs. Blackbird Creek Marsh Co.*, 2 Peters, 250.

The Legislature of Delaware had passed an act authorizing that company to construct a dam across Blackbird creek, which the company proceeded to construct. The defendant being the owner of a sloop regularly enrolled and licensed under the laws of the United States, broke and injured the dam. The company brought suit for the injury. The defendant set up as a defense those facts, and that the creek was a public navigable stream under the laws of the United States, etc. The plaintiff demurred, and the demurrer was sustained by the Supreme Court and the Court of Appeals of Delaware, and, on appeal, by the Supreme Court of the United States, Chief Justice MARSHALL delivering the opinion. Of course the dam was an obstruction to navigation, but it was authorized by the Legislature of the state, and such legislation was held not to be repugnant to the constitutional power of Congress over the subject, so long as Congress had never chosen to exercise that power.

Again, the same doctrine was affirmed in *Gilman vs. Philadelphia*, 3 Wallace, 713, a very instructive case. And still later, in *Pound vs. Turck*, 95 United States, 459, which was a case that went up from this district, and arose out of the construction of a dam across the Chippewa river. Pound, Halbert & Co., under the authority of the Legislature of Wisconsin, had erected a dam across the river. Turck, as assignee of French, Leonard & Co., brought an action to recover damages sustained by the delay and breaking of a raft of lumber caused by the obstruction of the dam. There was a verdict for the plaintiff, but the cause was reversed in the Supreme Court, following the authority of the two previously adjudged cases, above cited.

So far, then, as the obstructions to steamboat navigation,

caused by the booms and piers put in the river by the Beef Slough Company at the head of Beef Slough and vicinity, are authorized by the state Legislature, they are not a nuisance to be abated by a court of equity, even if the plaintiff had shown that he has been especially damaged by them, which he has not. The use of the river as a common highway is clearly a proper subject for regulation by municipal law, until Congress shall assume control of it in the interest of commerce.

Section 1, chapter 299, Private and Local Laws of 1870,[1] provides, that "the Beef Slough Manufacturing, Booming, Log Driving and Transportation Company are hereby authorized to maintain the piers, and the side, shore, sheer or glancing booms already constructed and heretofore used by them on and along the Chippewa river for the purpose of turning loose logs floating therein into Beef Slough, and to construct and maintain in Beef Slough, and upon land owned or leased by them, such piers, dams and booms as may be necessary to confine the water of said slough within its proper channel, and to secure the logs running into the same," with the proviso before mentioned, and the provision for paving the mouth of Beef Slough; which proviso and requirements the complaint alleges have not been complied with by the defendant.

It must be admitted that the authority conferred by the law of the state upon the company to enable it to take possession of Beef Slough for the purpose of maintaining piers, booms and dams, is very broad. Still it is alleged that the company in placing such obstructions in the river, and in engaging in the business of cutting and putting logs into the river, has exceeded its corporate powers, and therefore that such obstructions constitute a nuisance, and the defendant

[1] Private and Local Laws, Wisconsin, 1870, p. 755.

ought, in equity, to be compelled to remove all its improvements, whether authorized by law or not, and be enjoined from running any more logs in the river. But it appears to the court, on principle and authority, that such is not the proper remedy, and that the subject cannot be regulated by injunction, or other decree in chancery. Allowing that the company has exceeded its corporate powers in putting in the improvements, and in engaging in the running of logs, and has not complied with all the conditions of the acts of the Legislature, it does not follow that a court of equity can decree a forfeiture, for it amounts to nothing less if the prayer of the bill is granted, in a collateral proceeding like this brought by an individual. That is rather a matter between the corporation and the power which created it. So long as the state is satisfied and does not interfere either through its Legislature or by a direct proceeding in court to recover penalties, or to avoid its charter, it is not for a court of equity to step in at the instance of a private individual, declare the entire improvements a nuisance, cause them to be removed, and enjoin acts of which he may complain.

In a case of such magnitude, where the interests involved are so vast, and the improvements complained of as obstructions to navigation have been constructed under color of legislative authority, and have been used in facilitating an important branch of commerce, and acquiesced in so long, a court of equity will not interfere by perpetual injunction until the right of the party complaining has been established at law, and it appears that no adequate compensation can be afforded in damages.[1]

[1] *Burnham vs. Kempton*, 44 New Hampshire, 78; *Wason vs. Sanborn*, 45 New Hampshire, 172; *Ripon vs. Hobart*, 3 Mylne & Keen, 179; *Eastman vs. Manufacturing Co.*, 47 New Hampshire, 71; *Irwin vs. Dixion*, 9 Howard, 25; *Remington vs. Foster*, 42 Wisconsin, 608; *Delaware & Hudson Canal Co. vs. Lawrence*, 2 Hun, 168; *Mohawk Bridge Case*, 6 Paige, 554.

So long as Congress does not assume jurisdiction of the river, to control and direct its commerce, the defendants have the right to maintain such piers, dams and booms in the river for facilitating the running and securing of loose logs, as the state by its legislation has authorized, though they may constitute a material obstruction to other branches of commercial enterprise on the river. And if they, in putting in such improvements have exceeded their authority, or have not complied with all the conditions imposed, that is a matter which cannot be inquired into and remedied in a suit of this nature by a private individual.

It is noticeable that the plaintiff does not show by any allegations of fact that he has himself sustained any special, direct and material damage beyond the public at large on account of the erection and maintenance of the defendant's improvements at and in the vicinity of Beef Slough, which he should do to put himself in position to maintain his suit.[1] All the special injury he has sustained has been on account of the floating of loose logs in the river, and the action of the defendant, the Chippewa River Improvement and Log Driving Company, in combination with the other defendant, in erecting a dam on said river at Little Falls, some fifty to seventy-five miles above Eau Claire, the head of steamboat navigation, by which the defendants have held back the water to such an extent, from five to eight days at a time, on two different occasions, as to materially obstruct the navigation of the river above Eau Claire, and hinder and retard the plaintiff in the running of his boats.

But if the defendants have the legal right to float logs in the river, and to dam the river for that purpose, then the plaintiff has not set out enough to enable him to maintain a bill in equity for a perpetual injunction.

[1] *Irwin vs. Dixion*, 9 Howard, 25.

That the defendants, in common with the public, have the right to float logs down the Chippewa and other rivers and streams in the lumbering portions of the state, seems to me incontestable; and if so, then equity will not grant relief against the use of the river for such purpose, although the right may be so exercised on occasions as to cause damage to individuals engaged in other departments of commerce. Equity will follow the law, and not go in opposition to it. And if there happens, as there may, an abuse of the legal right, equity will not interfere to forfeit or crush out the right, but will turn the injured party over to his action at law for damages.

This is the only practicable course; for the manner in which the river shall be used by these several interests cannot, from the nature of things, be regulated by injunction. All a court of chancery could do, if anything, would be just what the plaintiff asks for in this case — enjoin and prohibit the use of the river for the purpose of floating logs, the use of the improvements placed in the river to facilitate that interest, and compel them to be taken out, which would amount to a complete denial of the right, and the forfeiture of an immense property, and a vast commercial interest. It cannot by a decree regulate the use of these improvements, nor the use of the river as a common highway, by the proprietors of these different interests any better nor so well as they are now defined and regulated by the law.

The Chippewa river is a public highway, and if a person should, without authority from the State, and disconnected with any purpose of improving or facilitating any branch of commerce upon the river, place obstructions in it, perhaps, in a suit brought by the proper party, equity would relieve against such obstructions to commerce by declaring them a nuisance, and enjoin their use. But the court cannot, by its decree, regulate the use of the river by the several classes of

persons pursuing different lawful branches of commerce and navigation any more than it can that of any other highway. The rights of these several classes are already well enough defined by law, and if any person or class of persons take or exercise a too exclusive or unreasonable use or possession of the river to the injury of other persons, the law affords an adequate remedy in damages. What would be an unreasonable use of the stream for purposes of commerce, such as would give a right of action at law, must be determined from a full consideration of all the facts and circumstances of the particular case and should be submitted to a jury.

A good deal might depend upon the relative importance of these different interests, to the welfare of commerce and the public good; for the court, as already intimated, cannot admit that there is anything peculiar about steamboat navigation that should give it any preference or superiority over other forms of commerce upon a stream adapted in a greater or less degree to both. The interest which the public has in the matter is to see that the stream is kept open and free to the use of the public for those purposes of commerce for which by nature and adaptation it is best fitted. If in the judgment of the state and of Congress it is worth more, and can be more advantageously and profitably used for the purpose of floating to market the products of the vast pine forests of the state than for the navigation of steamboats, then it should be used for that purpose. Or, if it can be as profitably and advantageously used for both, then it should be so used under the law as it is found, and under such regulations as the Legislature may from time to time make. The matter is peculiarly a subject for municipal regulation. As a matter of fact, the lawfulness of the use of the Chippewa river by both these interests has been fully recognized by the state.

That the use of the Chippewa river, in common with many

other rivers and creeks in the northern half of the state, for the floating of logs as well as lumber to market, is a lawful use, there is no manner of doubt. It has been practiced for nearly or quite half a century, and although the right has sometimes been denied by those engaged in other commercial interests, the use of these streams for such purpose has been general and uninterrupted for a long period, and from a time antedating the organization of the state government. The vast importance of the logging and lumbering interests on the Chippewa river sufficiently appears from the bill of complaint, and if it did not, the court should take judicial notice of it. To do otherwise, would be for the court to affect ignorance upon a subject of common notoriety respecting a leading commercial interest of the state.

The lawfulness of this right has been repeatedly recognized and upheld by the decisions of the Circuit and Supreme Courts of Wisconsin, as well as by a long course of state legislation, and is fully recognized by the act partially set out in the complaint, by force of which the Beef Slough Manufacturing, Booming, Log Driving and Transportation Company claims the right to maintain the piers and booms in the river, which are in part the subject of this suit.

By Chapter 399 of the General Laws of 1876, entitled "An act to facilitate the driving of logs down the rivers of this state, and their tributaries," as well as Chapter 144 of the Laws of 1872, of which it is amendatory, the right is explicitly recognized, and authority conferred for the organization of incorporated companies for the purpose of driving, sorting and delivering logs on the rivers of this State, and their tributaries, and for the improvement of such rivers and tributaries for such purpose; and it was under and by virtue of the authority of these acts that the other defendant, the Chippewa River Improvement and Log Driving Company was organized, and constructed the dam at Little Falls to create a

reservoir for the surplus water in times of a high stage, and detain it to be discharged and used for the floating of logs as it should be needed. And the decisions of the courts have gone far in holding these streams navigable highways for the purpose of floating logs — no further, however, than the public need has required. Indeed, it seems a public necessity that these streams, which may be profitably and advantageously used for the floating of pine logs at recurring seasons of the year, especially with the aid of dams which the law authorizes, and which of late it has become a common practice to employ, though they may go dry at other times, should be held navigable in fact for such purposes.

There is, perhaps, no other way by which the wealth of the pine forests of the state can be utilized with advantage or profit.[1]

The Supreme Court of Wisconsin has also affirmed the validity of state legislation, which provides for the improvement of the river by the building of booms and dams for the purpose of facilitating the running of logs.[2]

This use of the Chippewa as a lawful use has been more than once recognized and affirmed by Congress in acts appropriating money for the survey and improvement of the stream, and especially in Vol. 20, U. S. Statutes at Large, 372, in a proviso annexed to the appropriation as follows: "That nothing shall be done, nor shall any improvements be made on the said Chippewa river under or in pursuance of this act, or the appropriation hereby made, which shall directly or indirectly prevent, interfere with or obstruct, the free

[1] *Whisler vs. Wilkinson*, 22 Wisconsin, 572; *Olson vs. Merrill*, 42 Wisconsin, 203.

[2] *Tewksbury vs. Schulenburg*, 41 Wisconsin, 584; *Wisconsin River Improvement Co. vs. Manson*, 43 Wisconsin, 255.

navigation of the said river as heretofore, by steamboats or other water craft, or the free use thereof, as heretofore, for the running, floating, guiding or sheering of loose logs, or rafts of lumber or logs, upon or down the same, or which shall directly or indirectly prevent, obstruct or interfere with the use of any slough, arm or branch of the said river, as heretofore, for the holding, assorting or rafting of logs therein." Again, in the same volume, page 158, attached to an appropriation of ten thousand dollars for completing and protecting wing dams and jetties then in course of construction upon the Chippewa river, in and near its mouth, is this provision: "That nothing herein shall be construed, nor shall any expenditure of this appropriation be made so as to affect existing legal or equitable rights in or upon the said Chippewa river or its branches, whether such rights arise under the laws of the United States or the State of Wisconsin."

The authority of Congress under the Constitution is the highest that can be exercised on this subject, and should be decisive. But if there were needed any further authority to show the lawfulness of the use of the Chippewa river by the public for the purpose of floating logs to the markets of the world, and to show the authority of the state in the absence of congressional legislation, to authorize the improvement of the river by the building of dams, piers and booms, to facilitate that interest, we have it in the decision of the Supreme Court in the case of *Pound vs. Turck*, already referred to, which says: "There are within the State of Wisconsin and perhaps other states, many small streams navigable for a short distance from their mouths in one of the great rivers of the country, by steamboats; but whose greatest value in water carriage is as outlets to saw logs, sawed lumber, coal, salt, etc. In order to develop their greatest utility in that regard, it is often essential that such

structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the Legislature of the state may be most appropriately confided the authority to authorize these structures where their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interests of all concerned in the matter."

In the light of these precedents and statutory authorities, in connection with an extensive and uninterrupted usage coeval with the existence of the state, we do not hesitate to hold, that the use of the Chippewa river by the public as a highway for the transportation of logs and lumber is a right common to all, recognized and protected by the municipal law; and that such right must continue so long as the public have any need of its exercise, unless changed or abrogated by the Legislature of the state or by Congress. And there is no reason why it should not be so. It is the general commerce of the river which it is the object of the Constitution and laws to keep inviolate.

Navigation proper, or in its more limited sense, that is, by steamboats, vessels, sloops, ships, barges, etc., is but a branch of commerce, which includes all these and much more, and when navigable streams are best fitted for other branches of commerce, it is the true interest of the public to preserve them inviolate for the purposes to which they are best adapted.[1]

Nor do I overlook the fact, that it is alleged in the plaintiff's bill that the defendants have entered upon the business of cutting and running large quantities of pine logs without

[1] *Brig City of Erie vs. Canfield*, 27 Michigan, 479; *Moore vs. Sanborn*, 2 Michigan, 519; *Delaware and Hudson Canal Co. vs. Lawrence*, 2 Hun, 163.

any authority for so doing in their charters. That allegation is more a conclusion of law than a statement of a fact; but considering it as an allegation of fact, it makes the case no better; for the river is still a common highway for the floating of logs, open to all persons who have occasion to use it, and these companies, as against other individuals, would be entitled to the protection of the law, applicable to all. And if the state did not complain it is difficult to see how an individual could.

Suppose a corporation organized under the state law for banking purposes, engages in the business of farming or distilling, and uses the common highways of the country for the purpose of carrying the products of the farm or distillery to market. Is there any doubt that the same law of the road would apply to it that applies to all? Or, would it be claimed that such corporation might be enjoined, at the suit of a private individual from such use of a common highway, because the business it had engaged in was *ultra vires?*

The case made by the bill against the defendant, the Chippewa River Improvement and Log Driving Company, is not more satisfactory than that against the other defendant. Organized and claiming authority under chapter 399 of the laws of 1876, that company has built at immense cost, across the Chippewa, some fifty or seventy-five miles above steamboat navigation, a flooding dam, sixteen feet high, with thirty-two gates for the purpose of creating a reservoir of water to be kept and discharged as circumstances should require for the floating of logs, and, in using this dam, have so held back the waters of the river on two occasions as to injuriously affect the plaintiff in the running of his boats, by leaving them upon sand bars for the want of sufficient water to float them. This is the substance of the charge. It is true the plaintiff alleges that the act of 1876 does not confer any authority to float logs below the head of naviga-

tion, or in any manner to obstruct or interfere therewith; nor authorize any such unnatural stoppage of the water, and that if it were so construed it would be utterly void as against the laws of the United States and the Constitution of Wisconsin. But this is a conclusion of law which adds nothing to the case made by the facts. And the facts alleged are not enough to entitle the plaintiff to the relief sought, which is the abatement of the dam as a nuisance, and a perpetual injunction against its further use, and the running of loose logs in the river.

The act under which the said defendant is organized, empowers all companies incorporated for the purpose of driving, sorting and delivering logs on the rivers of this state, and their tributaries, and for the improvement of such rivers and tributaries for such purpose, to improve any of such rivers and tributaries, or any part thereof, by clearing and straightening the channels thereof, closing sloughs, erecting sluiceways, booms of all kinds, necessary side, rolling and flooding dams, *or otherwise: provided, however*, that such works of improvement shall not materially obstruct or impede navigation upon such rivers or tributaries.

This, it must be admitted, is very broad authority, and it is difficult to see why it does not in terms warrant the building of such a dam as is complained of. I think it does. But if there were any doubt on that point, the question should not be determined in a proceeding of this kind, as already shown; but the party should be first required to establish his right in a court of law. It is claimed that the statute was not intended to apply to the Chippewa river, because the Chippewa river is a navigable stream, and that it is unconstitutional and unlawful to build dams or to float logs upon a navigable stream. But we think there is no room for such a distinction. The statute is framed in the most general terms, and was evidently intended to apply to

all the lumbering streams of the state, whether navigable in any degree for boats or not: and such has been the general understanding and construction of the statute.

The complaint does not allege that the dam itself is an obstruction to navigation so as to bring the case within the proviso of this act, but only that the use of it in holding back the water of the river too long, impedes and obstructs navigation in the river below Eau Claire, where, and where only, the river is navigable by boats. It is not claimed that the river is navigable for boats at Little Falls, where the dam is built, or between there and Eau Claire on the river, some sixty or seventy-five miles below.

The practice of building these flooding dams on all the rivers and smaller streams in the lumbering portions of the state, has become of late universal, and their beneficial use to the logging interest is immense. It is expressly authorized by statute, and would seem to be almost a public necessity, it being the only way in which much of the pine timber can be utilized or made available. That the use of these dams should in some instances injuriously affect navigation by boats, could hardly be avoided, and must have been foreseen by the Legislature. But it is peculiarly the province of legislation to determine whether or not their convenience and benefit to the logging interest and to general commerce, would more than counter-balance the hindrance to steamboat navigation which their use would necessitate.

It is a proper subject of municipal regulation; and where the policy of the state is once made manifest by legislative acts, it is not in the province of a court of chancery, by its decrees, to run counter to that policy, and to declare that a nuisance, or the use of that a nuisance, which the law authorizes. If there be an abuse of the use of the thing so authorized by law, the law affords a remedy in damages; and that would be the appropriate remedy in this case if the law

must be resorted to for a remedy. It does not follow however, that because the plaintiff has suffered damages in the passage of his boats, by reason of the defendants' use of their dam, that he should be entitled to recover without any regard to other questions; such as the question whether, under all circumstances, the defendants have made an unreasonable use of the water, and how the beneficial use to the defendants, of the water in the manner charged, compared with the inconvenience which it caused to the plaintiff. Those are questions which would clearly be involved in the case, and it would be the province of the jury to determine them, from all the facts and circumstances in evidence.

The logging business, the business of sawing lumber and running rafts, and that of navigation by boats, are all interests that have grown up together on the Chippewa, as also on some of the other lumbering streams in the north half of the state. They are all interests which the law recognizes, and they are all entitled to its protection.

They are not, and should not be regarded as antagonistic. On the contrary, they are more or less dependent one upon the other; and by a little mutual concession and forbearance, and a just and reasonable spirit on the part of those persons severally devoted to them, they may, undoubtedly, all flourish in themselves, and be a help to one another. Such a course in the long run will be found much more advantageous to the public, and to the parties especially concerned, than the engaging in litigation, the effect of which, if successful, would be to exterminate or cripple what some are apt to regard as a rival interest.

The demurrer must be sustained, and as the plaintiff does

purchased by the plaintiff; *Second*, That the pendency of the Felch suit in Portage County, brought to prevent the issuing of the bonds, was constructive notice to the purchaser of the bonds, of any infirmity existing at the time of their issue.

We think neither of these positions are maintainable.

The mere fact that coupons for interest upon bonds of municipal corporations are overdue and unpaid, is not of itself, without other circumstances to put the purchaser on his guard, sufficient to dishonor the bonds, which are, to the full measure of the commercial law, negotiable paper. And especially in this case, where the record shows that the sale of the bonds during all the time when these three coupons were maturing, was restrained by an injunctional order issued by the Supreme Judicial Court of Massachusetts, in a suit brought on the chancery side of that court by the defendant in this action, to restrain and prevent the negotiation of the bonds, we think the purchaser, upon a dissolution of that injunction and final determination of that suit, in favor of the legality of the bonds, by the highest court of the state, might fairly presume that but for such suit and injunction the interest may have been paid. We think the existence of these facts shown by the record of the Massachusetts case sufficient to rebut any presumption of dishonor of the bonds or coupons arising from the bare fact of the coupons being overdue and unpaid, if such presumption would otherwise have existed. Upon the second point, it is quite clear that the pendency of a suit is not constructive notice to purchasers of negotiable paper, which is the subject of it. The rule has never been applied to suits respecting this species of property, and could not be without greatly trenching upon its value as a medium of commercial exchange.

We are also inclined to think that the record of the suit in Massachusetts, between the same parties and their privies,

is a bar to the matter of fraud set up in the answer, in respect to all such matters as had come to the knowledge of the defendant at the time of the commencement of that suit.

That suit was brought to test the legality of the bonds and to restrain their negotiation in the hands of the trustee of the railroad company, the original payee and holder; and the rule is, that the party is concluded, as well in respect to all those matters and things which might have been litigated under the issues, as to those which were actually litigated and decided in the former suit.

The suit was brought to test the validity of the bonds and restrain their sale by the company. The whole question respecting the validity of the bonds in the hands of the original holder was in issue. The County of Portage, the defendant in this action, was complainant, and the trustee selected to hold the bonds, and the railroad company, were defendants.

The complainant could not divide his cause of action, setting up one ground of illegality in that suit, and if he failed in that, bring a second suit for the like purpose, setting up another ground of illegality.

He should disclose the entire wealth of his case at once. Undoubtedly the suit would not be a bar to frauds discovered after the litigation took place, but there can hardly be any presumption that the frauds complained of here were subsequently discovered without some allegation or showing to that effect.

But, however this may be, we are clear that there is nothing in the case to affect the character and standing of the plaintiff as *bona fide* purchaser, for value, of the bonds before due.

Motion denied.

Drummond, J., concurring.

HONORA McCARTHY vs. TRAVELER'S INSURANCE COMPANY OF HARTFORD, CONN.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—DECEMBER, 1878.

1. ACCIDENT INSURANCE POLICY—TERM "ACCIDENTAL" CONSTRUED.—On an accident policy of insurance, where the death was alleged to have occurred by reason of the rupture of a blood vessel, sustained while exercising with Indian clubs: *Held*, that if the deceased used the clubs for exercise in the ordinary way, and without the interference of any unusual circumstances, the injury was not accidental; but if there occurred any unforeseen accident or involuntary movement of the body which, in connection with the use of the clubs, brought about the injury, then such means were accidental and within the terms of the policy.

2. PROXIMATE AND REMOTE CAUSE.—By the terms of the policy it was provided that the injury must be the proximate and sole cause of the death: *Held*, that if death ensued as a consequence of inflammation, and the formation of abscesses and the accumulation of injurious substances in the lungs, and these were the necessary results of a rupture of the blood vessel, then such injury was the proximate cause of the death. But if an independent disease supervened upon the injury, or a slumbering disease was brought into activity by the injury, then such injury was not the proximate cause.

3. Proximate cause defined.

4. Testimony showing the health of the insured from infancy to his last sickness is admissible,

5. BURDEN OF PROOF.—In such case the burden of proving that the death was the result of disease is upon the party alleging it.

Action on an accident insurance policy.

The policy provided that in case of injuries effected through external, violent or accidental means, the company should be liable; but that the liability should not extend to any bodily injury of which there should be no external or visible sign, nor to any injury happening directly or indirectly in conse-

quence of disease, nor to any case except where the injury was the proximate and sole cause of the disability or death.

It was claimed for the plaintiff that the deceased, while exercising with Indian clubs, ruptured a blood vessel in his lungs, and that his subsequent death was the result of such injury. There was evidence tending to show that one of the clubs struck against a stove, thus causing the injury.

It was claimed for defendant that if there was a rupture as alleged, it happened in consequence of a then weak and actually diseased condition of the lung or lungs, so that indirectly, if not directly, the injury happened as a consequence of such condition, and that no rupture would have occurred if there had been no unsoundness or disease.

Evidence was also given bearing upon the question whether any disease supervened between the time of the injury and the death of the deceased, and there was evidence tending to show that deceased suffered from pulmonary consumption after the time of the injury.

N. S. Murphey, for plaintiff.

H. M. Finch, for defendant.

DYER, J., in charging the jury, said:—The policy of insurance in this case is of the form and character known as an accident policy. To entitle the plaintiff to recover, it must be shown by the evidence that the deceased sustained a bodily injury, which was effected through means which were *external, violent* and *accidental*, and that such injury was the proximate and sole cause of the death, as I shall hereafter more fully explain to you. If a bodily injury was sustained, and it happened directly or indirectly in consequence of disease, or if the death was caused wholly or in part by bodily infirmities or disease, existing either prior or

subsequent to the date of the policy of insurance, then the plaintiff is not entitled to recover. * * *

A question of considerable nicety has been presented, arising in connection with the evidence under the clause in the policy, which describes the means through which the injury must be effected in order to create a liability. It is a question concerning which my mind has not been free from doubt; but in view of the language of this policy, which requires that the *means* through which the injury is effected must be accidental, I instruct you that if the deceased voluntarily took in his hands the clubs for exercise, and used them for such exercise in the way and precisely as he intended to do, and without anything occurring to interfere with his intended and usual movements in such exercise; that is, if he voluntarily used them in the ordinary way for taking such exercise, without the occurrence of any unusual circumstance interrupting or interfering with such use, or causing any unforeseen, accidental or involuntary movement of the body, and in such use of the clubs there occurred the rupture of a blood vessel and consequent injury as claimed, I do not think it could then be said that the means through which the injury was effected were accidental. But, if while engaged in such exercise there occurred any unforeseen, accidental or involuntary movement of the body of the deceased, which, in connection with the use of the clubs, brought about the injury; or, if there occurred any unforeseen or any unexpected circumstance which interfered with or obstructed the usual course of such exercise, and there was thereby produced an involuntary movement, strain or wrenching, by means of which the injury was occasioned, that would be an accident within the spirit of this policy; that is, the means by which the injury was effected would in such case be accidental. * * *

If you find that an injury was sustained, and through

the operation of such means, you will then proceed to inquire whether the injury happened directly or indirectly in consequence of disease then existing in the lungs of the deceased.

This brings us to the affirmative matter set up as a defense to the action. And first, I call your attention to this clause in the policy, namely, that the insurance shall not extend to any injury happening directly or indirectly in consequence of disease. Here is presented to you the question whether, at the time the alleged injury was sustained, the lungs of the deceased, or either of them, were or was diseased. You will inquire upon this point, in the light of all the evidence, whether the injury, if one was sustained, happened either directly or indirectly in consequence of disease in the lungs of the deceased; and if you so find, that would necessarily require a disposition of the case by you adverse to the plaintiff. But if you do not so find, then you will proceed to inquire whether the *death* was caused wholly or in part by disease existing prior or subsequent to the date of the policy of insurance. And this is another important question arising upon this branch of the case.

The clauses of the policy bearing upon this question are, that the insurance shall not extend to any death which may have been caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date of the policy, nor to any case except where the injury is the *proximate* and *sole* cause of the death.

This policy of insurance is a contract made between the insurance company and the assured. As such, we must construe and enforce it according to its letter and spirit. It is to be interpreted as the parties made it and as we find it. We have no right to import into it that which it does not contain. We must interpret it fairly and properly, giving to each party equally the benefit of its provisions.

So interpreting and enforcing it, it must be held that if any other cause than the alleged injury, in whole or in part, produced the death of the deceased, there can be no recovery. In other words, to entitle the plaintiff to recover, you must be satisfied that the injury, in the language of the contract, was the *proximate* and only cause of the death. By proximate cause is meant that cause which directly precedes and produces the effect, as distinguished from the remote cause.

The question is, what was it that caused death? Did the injury, as the proximate and sole cause, produce it, or did other causes supervene and produce death?

I have stated to you, generally, the definition of proximate cause. And it must be remembered that whether a cause is proximate or remote does not depend alone upon the closeness in the order of time in which certain things occur.[1] In other words, the application of the principle relating to proximate cause is not necessarily "controlled by time or distance, nor by the succession of events. An efficient, adequate cause being found must be deemed the true cause unless some other cause not incidental to it, but independent of it, is shown to have intervened between it and the result."[2] Now, applying this principle to this case, I instruct you that if the deceased sustained injury by the rupture of a blood vessel in his lungs, and that necessarily produced inflammation, and that necessarily produced a disordered condition of the injured organ, which was in consequence followed by the formation of abscesses and the accumulation of injurious substances or matter in the lungs, and so there resulted a diseased state of the lungs, whereby they could no longer perform their functions, and in consequence the insured died;

[1] *Cunningham and Wife vs. Lyness*, 22 Wisconsin, 245.

[2] *Kellogg vs. Chicago & Northwestern Railway Co.*, 26 Wisconsin, 223.

that is, if all these results followed the injury as its necessary consequence, and would not have taken place if it had not been for the injury, then I think the injury could be said to be the proximate cause of death. But if an independent disease supervened upon the injury, one not necessarily produced by the injury, or if the alleged injury merely brought into activity a then existing though slumbering disease, and the death of the deceased was caused wholly or in part by such disease, then it could not be said that the injury was the sole and proximate cause of the death. The question for you to determine is, was or was not the diseased condition of the lungs of the deceased which preceded death the necessary consequence of the injury? Was it the injury alone that brought such condition into life and fatal activity?

Testimony has been adduced on the part of the plaintiff to show the state of health of the deceased from his infancy to the time of his last sickness, and witnesses have testified as to the health of his parents, and to the effect that so far as external observation by persons familiar with him and his family could disclose, he was, in his boyhood and to the time of the injury, in sound and vigorous health; all of which testimony it is proper and important that you should consider.

* * * * * * *

It becomes important that you carefully inquire whether the alleged injury was sufficient, in its inevitable consequence, to cause death. It is material to ask whether such a condition of the lungs as was disclosed by the autopsy was produced by the injury and could have come into existence in the time that elapsed between the injury and the death. If there was a diseased condition of the lungs when the injury was sustained and it merely facilitated the progress of the disease, or if a disease such as pulmonary consumption supervened, not as the necessary consequence of the injury, then you cannot say that the injury caused the death. The

contrary should be your conclusion if you are satisfied from the evidence that the alleged diseased conditions were wholly dependent for their existence, upon the injury.

* * * * * * * *

I have been asked to instruct you concerning the burden of proof in this case. Upon that subject I say to you that neither party is bound to prove negatives. Upon each rests the burden of proving the affirmative matter which he alleges and upon which issue is taken. The plaintiff is bound in the first instance to prove that the deceased sustained injury; that such injury was effected through the means specified in the policy and was sufficient to cause death, and that death ensued. The defendant company, alleging as it does that death was caused by disease and not by the injury, then assumes the burden of proving what it thus affirmatively alleges. * * * * * *

Now, to sum up the case in brief: if you find from the evidence, that the deceased, J. J. McCarthy, on the 25th day of May, 1877, sustained the bodily injury which is alleged, and that such injury was effected wholly through means which were external, violent and accidental, and that the injury was the proximate and sole cause of his death, then the plaintiff would be entitled to recover and should have a verdict.

But if you find, either that the alleged injury was not sustained, or that, if sustained, it was not effected through external, violent and accidental means, or that it happened directly or indirectly in consequence of disease then actually existing, or that death was caused wholly or in part by bodily infirmities or disease existing either prior or subsequent to the date of the policy of insurance, then your verdict should be for the defendant.

Verdict for plaintiff.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY vs. JAMES E. TYLER *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—DECEMBER, 1878.

IN EQUITY.

1. ASSIGNMENT OF MORTGAGE—LIABILITY FOR DEFICIENCY.—An assignment by the mortgagor of his interest in the mortgaged premises, to a third party, who agrees to pay off the mortgage, will not prevent a deficiency decree being entered against him unless he has been released by the mortgagee.

2. RELEASE OF ASSIGNOR.—And the acceptance by the mortgagee of a second mortgage upon the same premises, from such assignee, would not constitute a release of the first mortgagor from his personal liability to pay a deficiency.

Isham & Lincoln, for complainant.

Monroe, Bisbee & Ball, for defendants.

DRUMMOND, J.—This is an application made for a decree, payable in money, for the balance that has been found due to the plaintiff, over and above the proceeds of the sales on mortgage foreclosures, in pursuance of the 92d rule in equity. This motion is opposed by the owner of one of the lots mortgaged, and which has been sold.

The facts are substantially as follows: There were four lots on Monroe street, in Chicago, and which for distinction we will call numbers 1, 2, 3, and 4. No. 1 was on the corner of Dearborn street and owned by Mr. Shepard. The estate of Albee owned No. 2, and Prickett & Drysdale 3 and 4. Shepard made a mortgage of his lot to the plaintiff.

Prickett & Drysdale also made a mortgage of No. 3 to the plaintiff.

After these mortgages were made, Tyler purchased the whole of the four lots, of course subject to the mortgages made by Shepard, and by Prickett & Drysdale. He then mortgaged the whole of the four lots to the plaintiff. The plaintiff thus became the owner of three mortgages on the property, from Shepard, lot No. 1; from Prickett & Drysdale, lot No. 3, and from Tyler of all the lots, 1, 2, 3 and 4. The plaintiff filed a bill of foreclosure on all the mortgages in one suit, and obtained a decree, and the lots were sold separately. Lot No. 1 was sold and bid in by the plaintiff for about $8,000 less than the amount due on the Shepard mortgage. Lot No. 3 was bid in for a sum greater than was due on the Prickett & Drysdale mortgage; and the other lots were bid in at prices which caused a large deficiency on the Tyler mortgage. And the principal question is whether the plaintiff is entitled to a personal decree against Shepard for the full amount of the balance due on his mortgage.

It seems to me clear that the plaintiff is entitled to this money decree. It is said that there was a novation made by the parties, because Tyler purchased the property, subject to the two prior mortgages, and agreed to pay them off, and that when the mortgage was made by Tyler to the plaintiff, there was a ratification and recognition of the two mortgages already made. But there is nothing upon the face of the papers, or in the proofs to show that the plaintiff ever released Mr. Shepard from the obligation of his mortgage, and, of course, there could not be a novation unless there was a release of his obligation, and some other person substituted for the payment of what was due by him, for instance, Mr. Tyler; but there is nothing to show that the plaintiff agreed to look to Mr. Tyler for the payment of the Shepard mortgage, and to release the latter. Consequently,

one of the main elements of a novation was wanting in the case. The property having been sold for less than the amount of the debts due, the plaintiff is clearly entitled to a personal decree against Mr. Shepard, and also against Mr. Tyler for the balance due.

The 92d rule in equity, under which this motion is made, authorizes a personal decree against the mortgagor for the balance due above the price paid on the sale of the property in a foreclosure case; and consequently under the facts in this case, the plaintiff is entitled to the decree which he asks against Mr. Shepard and Mr. Tyler respectively.

HOYT SHERMAN, Assignee, vs. THE INTERNATIONAL BANK *et al.*

Circuit Court — Northern District of Illinois — December, 1878.

In Equity.

1. Amendment to Petition in Bankruptcy — Effect by Relation.—Amendments to a petition in bankruptcy relate back to the time of the filing of the original petition, and have the same force and effect as though included in the petition itself.

2. When Assets Vest in Assignee.—Where a party was adjudicated a bankrupt solely on the acts of bankruptcy stated in an amendment to the petition filed against him; and prior to the filing of the amendment, but subsequent to the filing of the original petition, he had disposed of certain securities: *Held*, that the assignment to the assignee related back to the filing of the petition, and had effect from that date to transfer all assets of the bankrupt to the assignee, and that the bankrupt had no power to make any transfer of such securities, and that no title passed by his transfer and delivery.

Sherman vs. International Bank.

3. Assets—Interest in Speculative Operations.—The bankrupt and certain other parties made a contract by which a speculation in real estate was arranged, the bankrupt to have a certain per cent. interest and a division of the profits: *Held*, that the bankrupt had such an interest in the assets, which grew out of the real estate operations, as would pass to the assignee.

4. It was not the case of a partnership where all the partnership property vested in the other partners.

This was a bill in equity filed for the purpose of reaching certain assets which, it was alleged, belonged to the bankrupt, B. F. Allen, and which were then held by some of the defendants.

John E. Burke, for complainant.

Rosenthal & Pence and *John P. Ahrens*, for defendants.

Drummond, J.—There are but two questions involved in the case, and I have resolved them both in favor of the plaintiff.

The bankrupt was the president of the Cook County Bank, in Chicago, and failed in January, 1875. On the 23d of February following, a petition in bankruptcy was filed against him in the District Court of Iowa. That petition alleged a certain act of bankruptcy committed by him; and Allen, on the 16th of March following, filed an answer denying the act of bankruptcy alleged in the petition. On the 22d of April, 1875, the petition in bankruptcy was amended by alleging other acts of bankruptcy; but Allen made no further objection, and the adjudication of bankruptcy followed on the same day. The adjudication was on the acts of bankruptcy stated in the amendment, and set out in the adjudication. Between the time that the petition was filed and the date of the amendment and adjudication, certain securities, which are the subject of controversy in this case, were transferred by Allen to the defendants under the following circumstances: He was arrested on a capias, and held by

the officer under the process. In order to relieve himself from arrest, he transferred these securities, and was accordingly released. This was on the 20th of March. The question is as to the status of these securities at the time this took place. Had the bankrupt the right to transfer them? And could the defendants acquire property in them? I think not. The assignment which was made to the assignee related back to the 23d of February, when the petition in bankruptcy was filed, and had effect to transfer all the assets of the bankrupt from that time to the assignee; and the bankrupt, therefore, had no power over his assets to transfer them, and no party could acquire any right in them. By operation of law they vested in the assignee from the 23d of February, and the bankrupt neither could transfer them, nor could others acquire property in them.

It is claimed that inasmuch as the adjudication in bankruptcy was made upon the amendment which was filed, and as the transfer to the defendants was made before the amendment was filed, the legal effect was, that the assignment did not vest the assets of the bankrupt on the 23d of February, but on the 22d of April, when the amendment was made, and the adjudication took place. I am not prepared to say but that there might be a case where this principle would be true, as, for example, if there was a petition in bankruptcy filed, upon which the court could not render any decree—which could not be considered, within the meaning of the law, a real, genuine petition in bankruptcy, then it might be true that where an amendment was allowed so as to give it effect as a petition in bankruptcy, the assignment would only take effect from the latter date; but where a legal petition in bankruptcy is filed, it is subject always to the right of the parties who are petitioners, whether the bankrupts, or creditors, to make amendments to the petition. It is filed subject to the power of the court to allow amend-

ments, and, therefore, that is a condition which must always be understood, that it is subject to the right of the petitioners to make amendments, and to the power of the court to permit them; and when made, they, as a general rule, relate back, and take effect from the time that the petition in bankruptcy was filed. It is still a petition in bankruptcy; it still takes effect from the time that it is filed, and the property of the bankrupt is vested in the assignee, in my opinion, from the time that the petition is filed. So that in this case, as the bankrupt undertook to transfer assets of his after his petition in bankruptcy was filed, he had no power over them. The act gave no right, and the defendants acquired none by the transfer. The property by operation of law was vested in the assignee.

The next question is, whether or not these assets were a part of the estate of the bankrupt. I think they were. They grew out of a contract made between the bankrupt and certain other parties, by which a speculation in real estate was arranged, and the agreement contained in the contract was carried into effect, mainly by Allen, the bankrupt. He was to advance the money to purchase the real estate. Upon the advances he was to have ten per cent. interest; and the profits of the speculation were to be divided between him and certain other parties. At the time the petition in bankruptcy was filed, no one else, I think, was interested, although there were other parties originally interested in it; no one else, perhaps, except Mr. Tracy, now dead, and Mr. Withrow. The interest of Withrow, as I understand, has been ascertained by decree of the court against the assignee, and his rights have been adjudicated. I can have no doubt that there were rights in these assets which grew out of these real estate operations, and which were in the hands of Allen, which should properly vest in the assignee. It is not like the case of a partnership

where all the partnership property is vested in the surviving partners, in the case of the death or bankruptcy of one of the partners, and where there are only certain interests which go to the assignee or to the estate. In this case, there was an actual interest such as could pass, and did pass, to the assignee, in this property and in these assets. Allen had made very large advances for the benefit of those who were interested with him. For those advances they owed him, and he had a first claim upon these assets for the advances, amounting to over $60,000, I think; so that, that was such an interest in Allen at the time his petition in bankruptcy was filed, as would pass to his assignee. If there are any equities in other parties, of course, these equities can be adjusted by proper proceedings against the assignee. The assignee, as the representative of Allen, has the right to control these assets, subject to any equities that may exist.

Now, it may be said, and such is undoubtedly the fact, that this is a hard case for the defendants; but it is like any other act that is done where there are proceedings pending, which proceedings operate as a seizure of the property which is sought to be transferred. For the reasons I have given, I think that the bankruptcy proceedings did operate upon all the assets of the bankrupt from the time that the petition was filed, depriving the bankrupt of all right over them; and, of course, he could exercise none, and could clothe no one else with any right. It is, therefore, the ordinary case of a party who, under circumstances like these, deals with a person who has no right over the property. A great many cases of that kind occur in business matters, where an innocent party has to suffer in consequence of the want of power of another person to convey the property.

I think, therefore, that the plaintiff is entitled to a decree in this case. The questions are important, and especially the one in relation to the bankruptcy—the effect of the peti-

tion in bankruptcy and the amendment; and I think there is no decision exactly in point in such a case, although there are some which indicate pretty clearly the general current of authority as to the effect of a petition.

The opinion in this case was affirmed by the Supreme Court on appeal in *Bank vs. Sherman*, 101 United States, 403.

As to amendments to petitions in bankruptcy, see, also, *In re Williams & McPheeters*, 6 Bissell, 233; *In re Patterson*, 1 Bankruptcy Register, 131; *Stone & Warren vs. Connelly*, 1 Metcalf, (Ky.) 352; *Stoddard vs. Meyers*, 8 Ohio, 203; *Gibbon vs. Dougherty*, 10 Ohio, 365. [*Reporter.*

JAMES STINSON vs. JESSE S. HILDRUP *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—DECEMBER, 1878.

IN EQUITY.

SIGNATURE OF COUNSEL TO BILL.—Where an attorney of this court signs a bill as solicitor for complainant, this is a sufficient compliance with the 24th Equity Rule, which requires all bills to be signed by counsel.

A motion was made in this case, in the District Court, by the defendants to dismiss the bill for want of the proper signatures of counsel; and there was also a cross motion by the complainant to amend the bill by adding to the signature the words, "of counsel." On the 15th of November the court allowed the former motion, and disallowed the latter. Thereupon, the plaintiff made a motion to set aside this order, which was overruled by the district judge. Appeal to the Circuit Court.

John I. Bennett, and *J. C. Dunlevy*, for complainant.

A. B. Mason, for defendants.

DRUMMOND, J.—The question is whether the order made by the court on the 15th of November was correct.

The bill is signed by the complainant in his own person, and by J. C. Dunlevy and John I. Bennett, "solicitors for complainant." The reason of the decision of the court seems to have been because of the addition made to the signatures of Messrs. Dunlevy and Bennett, "solicitors for complainant," instead of the words, "of counsel," or "counsel for complainant."

The defendants insist that it is not a sufficient compliance with the rule—for a person who is a counselor of the court to state that he is a solicitor for the complainant, but that he should state that he is "of counsel for the complainant." The 24th Rule in Equity is as follows:

"Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that upon the instructions given to him, and the case laid before him, there is good ground for the suit in the manner in which it is framed."

Of course this rule is obligatory in all cases, and it may be said, that no bill is complete unless it is complied with. It is not questioned, as I understand, that J. C. Dunlevy and John I. Bennett were at the time they appended their signatures to the bill, counselors of the court; but it is claimed that as they appear simply in the character of solicitors it is different from that of counselors. The authorities which have been referred to by the counsel of the defendants are, most of them, from the English courts where, as is well known, there is a distinction between attorneys, solicitors and barristers, and it might be a very proper practice in courts

where there was this distinction that there should be added to the signature the description of that part of the profession to which the person belonged, whether a solicitor, an attorney, or a barrister, but there is no such distinction in our courts and under our practice; and the reason of the rule requiring the description of the person to be added ceasing, the rule itself, it would seem, ought to cease. An attorney regularly admitted to practice in this court, is a counselor of the court within the 24th Rule. A distinction is sometimes made as to these terms which is purely arbitrary, between proceedings in equity and at common law. The practice of the bar generally is, when a member signs a common law pleading it is as attorney; if an equity pleading, he signs it as solicitor. But this is a distinction arising merely from the two kinds, or modes of proceeding. He is counsel, and attorney, of the court in whichsoever form he appends his signature. In common law proceedings we speak of the actor, or party bringing the suit as plaintiff and in equity proceedings as complainant; but in point of fact this is a distinction without a difference. The complainant in the equity proceeding is the "plaintiff" as the plaintiff in the common law proceeding is the "complainant." They are convertible terms, although for the purpose of distinguishing whether the suit is at law or in equity, different names are sometimes used. In the equity rules of the Supreme Court, the actor is always called plaintiff, and not complainant.

It will be observed that the 24th Rule does not require that the party signing as counsel shall give any character to his signature. It does not say that he shall designate that he is of counsel, or solicitor, or an attorney, but simply that his signature shall be annexed to the bill. "The bill shall contain the signature of counsel." It might be a matter of grave doubt, whether, in point of fact, the true construction

of this rule, if a counselor of the court did actually append his signature to the bill, would require him to describe himself in any other way than what might be inferred from the mere signature itself.

I am somewhat at a loss to know what is the distinction, under our practice, between the terms, "solicitor" and "counselor." I should be very much inclined to think that if there were the signature of counsel to the bill, whether he was described as "counselor," as "solicitor," or as "attorney," that the description might be rejected as surplusage, and that it would stand as a compliance with the rule. But, however this may be, it seems to me clear that if the signature is that of a counselor of the court, and he is described as solicitor, that the bill ought not to have been dismissed on the motion of the defendants; but that the cross-motion of the complainant ought to have been allowed, and the words, "of counsel for the complainant" have been permitted to be added to the signatures of Mr. Dunlevy and Mr. Bennett.

I am, therefore, of opinion that the order of the District Court, made on the 15th of November ought to be set aside.

MALCOLM C. TURNER *et al.* vs. THE INDIANAPOLIS, BLOOMINGTON & WESTERN RAILWAY COMPANY *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA AND SOUTHERN DISTRICT OF ILLINOIS—DECEMBER, 1878.

IN EQUITY.

1. FEDERAL JURISDICTION—RES ADJUDICATA.—Where a cause has been removed from a State Court to the Federal Court, and a motion to remand for want of jurisdiction, has been overruled by the Circuit Justice then presiding, if the cause subsequently comes before the Circuit Judge, he will not review the question of jurisdiction. That is considered as settled if there is no appeal.

2. PUBLICATION IN CHANCERY—REMOVAL OF CAUSE.—The fact that proof of the publication notice to a defendant in chancery was not made in the State Court, prior to the order of removal of the cause to the Federal Court, does not prevent the latter court having jurisdiction over such defendant, if the publication was actually made according to the state statute.

3. JURISDICTION.—If a defendant voluntarily files an answer, the court acquires jurisdiction over him, whether any replication is put in to the answer or not; and the rights of such defendant, which were in question, are considered adjudicated by a decree in the case.

4. DECREES—AMENDMENTS AT SUBSEQUENT TERM.—Though the court cannot change the essential parts of a decree after the term at which it was entered, yet it has the power subsequently to amend the decree as to the mode of its execution, the manner of a sale, the time of publication of such sale, and the distribution of the proceeds arising therefrom.

5. SAME.—By the original decree for the sale of a railroad, it was provided, that the purchasers should pay enough in money, to liquidate certain judgments, taxes, and other claims, if they should be allowed; and, by an amendment to the decree entered at a subsequent term, it was provided that the property should be sold subject to the judgments, taxes, claims, etc., in the hands of the purchasers: *Held*, that the court had the power to make such amendment.

Turner vs. I., B. & W. R'y Co.

6. SETTING ASIDE MASTER'S SALE—INADEQUACY OF BID.—In order to set aside a master's sale in foreclosure proceedings on account of the inadequacy of the bid, it is not sufficient to show that the property has not realized its full value; the price must be so inadequate as to show that it is not the result of fair dealing and an honest purchase.

7. ADVANCE BID—RESPONSIBILITY OF BIDDER.—Where parties desire to have the sale set aside for inadequacy of the bid, they must show that some person, who is responsible, will make an advance bid.

8. NO REDEMPTION OF RAILROAD.—There is no redemption from the sale of railroad property under foreclosure proceedings in the Federal Courts in this circuit.

9. DEPOSIT BY BIDDERS.—It is proper practice for the court to require each bidder, at a master's sale of large railroad interests, to make a deposit of $50,000.

10. SALE SUBJECT TO CONTINGENT CLAIMS.—Where the amount of claims to be allowed against a railroad, depends upon a long course of litigation, it is proper for the court to order the property sold, to be subject to such claims as finally adjudicated.

11. BIDDING IN PROPERTY BY COMMITTEE.—Where the property was bid in by a certain committee acting as agents of the bondholders of the railroad, it is not necessary that it should be shown further, who are their principals.

12. ASSIGNEE IN BANKRUPTCY, if made a party to a suit, must come in and assert his rights, or he will be barred by decree on default as any other party.

Under a decree of the Circuit Court for the Southern District of Illinois and the District of Indiana, made in the summer of 1877, and an amendment made to that decree in May, 1878, in both of these courts, the main line of the Indianapolis, Bloomington & Western Railway Company was sold by the Master in Chancery of each court. The road extends from Indianapolis, in the State of Indiana, to Pekin on the Illinois river, in the State of Illinois. It was sold by a decree of the Circuit Court of the two districts as one piece of property, by the masters jointly, and was purchased by a committee of the bondholders.

The sale took place on the 30th day of October, 1878. After the sale, exceptions were filed by various persons, and

also by the company, which were disposed of in the following opinion.

R. E. Williams, for Thomas, trustee.

N. A. Cowdry and *G. W. Kretzinger*, for Turners' assignee.

J. D. Campbell, for purchasers.

DRUMMOND, J.—The first exception is that the court had no jurisdiction of the case, and therefore the decree was void. Under the circumstances, I can scarcely consider this an open question. The cases were originally brought in the State Courts of Illinois and Indiana, and were transferred, under the Act of Congress of 1875, to the Circuit Courts of the United States for the Southern District of Illinois and the District of Indiana. A motion was made in the Circuit Court for the Southern District of Illinois, to remand the case to the State Court, on the ground that the Federal Court had no jurisdiction. The question was argued before DAVIS and TREAT, JJ., fully considered and decided by them; the court holding that it had jurisdiction of the case, under the Act of Congress of 1875. An order was accordingly made, denying the motion to remand. A like order was made in the District of Indiana. I do not think, therefore, it would be proper for me, whatever my own view of the question of law might be, to change the ruling of the court. If erroneous, the parties have their remedy by an appeal to the Supreme Court of the United States.

The second exception is, that the issues raised in the original bill were not determined by the court; as there was a chattel mortgage to one Thomas as trustee, and no effort was made by publication, subpœna, or otherwise, to bring him within the jurisdiction of the court. The facts were substantially these: He was made a party to the cross bill, filed by the Farmers' Loan and Trust Co., of New York,

the original bill having been filed by the Turners. The law of Illinois, where the proceeding took place, and which is to decide this question is, that a non-resident who is not served with process in a chancery proceeding, can be brought into court on an affidavit and publication. An affidavit was accordingly filed and publication in pursuance of the statute was made in a newspaper. Before the proof of publication was filed in the State Court, where the case was pending, it was transferred to the Circuit Court of the United States, and, it is said, that the proof of publication was not even made before the order of transfer. I am not prepared to admit that would destroy the legal effect of what had taken place in relation to the affidavit and publication. It seems to me, on the contrary, if the law of the state was observed, a party would be brought into court under the circumstances of the case, although the proof of publication was not actually made. It might be a very doubtful matter, whether or not the fact of the transfer would vitiate the notice. On the contrary, it would seem, in a case properly transferable, all the conditions which the state law has imposed on the case before the transfer, are to be observed; and if anything should occur to prevent the consummation of the act, which the law of the state contemplated, the transfer would not render it nugatory. However, whether that be so or not, it is clear, from what has appeared since these exceptions were argued, that Thomas, the trustee, was a party to the proceeding in the Circuit Court of Illinois. He appeared by answer filed. He was, therefore, a party to the litigation and he cannot now object that the court had no jurisdiction over him as trustee of the chattel mortgage.

It is said that a replication was not filed. That would not prevent the court from exercising jurisdiction over him as trustee, or impair the effect of the adjudication of the court. If no replication was filed, that must be considered as waived.

Inasmuch as the cross bill of the trust company was filed for the express purpose of determining the respective rights of the parties before the court, some of whom were Thomas, trustee of the chattel mortgage, and the New York company, the trustee representing the bonds for which the mortgages on the main line were given, it must be considered, that when the court adjudicated upon that question and determined that the bondholders, under their mortgages, had a prior and better right, that it also decided the other question although nothing is said in the decree as to the rights of Thomas, the trustee of the chattel mortgage. He claimed a prior right under the chattel mortgage. The other parties claimed a prior right under their real estate mortgages. The court decided that the bondholders, and the mortgages which were given to secure the bonds, had a prior right. That was the main question before the court, which was decided and, of necessity, the rights of Thomas as trustee, were also adjudicated. Therefore, the issues raised by the pleadings in the original bill and cross bill, as to the claim of Thomas for a prior lien, were adjudicated. The second exception must be overruled.

The third exception is, that the court had no authority to amend its decree after the term of the court. The facts were that the original decree was entered on the 18th of July, 1877, and the amendment was made in May, 1878. I admit the rule which denies the power of the court over a decree after the term when it was rendered. It cannot change or alter the essential parts of the decree. But what was the order made by the court in May, 1878? It is termed *a further direction for the execution* of the decree theretofore entered. The original decree provided that the property should be sold on a certain number of days publication. That was changed by the amendment. The original decree provided for the distribution of the funds arising from the

sale in a particular manner. That was changed by the amendment of May, 1878. But these things did not affect the substance of the decree. Of the right of the court to make that order, I cannot doubt. We will, therefore, pass on to the question about which there seems to be serious controversy.

The thirteenth article of the original decree provided that the sale should be made subject to judgments for right of way, to the taxes which were a lien upon the property, and also, to a certain contract of lease for box freight cars which had been made with the receiver by a man named Adams.

The fourteenth article of the original decree provided,—after declaring that $50,000 should be offered as a deposit, and after the purchase, $50,000 more should be advanced, out of which two sums certain costs should be paid,—that on the delivery of the deed, so much more of the purchase money should be paid into court, in cash, or certificates of receiver's debts, as should be necessary to pay that portion of the receiver's debts made in the operation of the main line of railway, not theretofore directed to be assumed by the purchaser, with such other claims as should be allowed by the court; meaning what were called the back claims, many of which were pending and undecided, and in which, it was understood that under certain circumstances, the decision of the court might be reviewed by the Supreme Court of the United States.

It will be seen, therefore, that under the original decree, the sale was to be made subject to certain claims, and, that the purchasers had to provide money enough to pay all the claims, which might be allowed by the court, on appeal to the Supreme Court of the United States. What is the change made in these respects by the amendment? It recites, "that the sale shall be made subject to the judgments for right of way, to the taxes, to the lease made with Adams

by the receiver, and also, subject to certain debts which might be due from the receiver, and also, to such claims as might be allowed by the court on appeal to the Supreme Court of the United States." The only effect was, that whereas, by the original decree, the creditors were required to bid enough to pay these claims and some of the debts of the receiver; in the amendment, it was provided that the sale should be made subject to them, so that they remained as a burden upon the property. That is the only change made which it is material to consider. Was that such a change in the original decree as the court had the power to make? I think it was. It was, so to speak, simply changing the amount of money which was required to be bid for the property. Undoubtedly, it would have been better and much more satisfactory if the court, before it had ordered a sale under the original decree, could have informed the parties, who might purchase the property, what was the precise amount of liens upon it. But that, in the nature of the case, was impossible unless we had waited, before the property was sold, until the final determination of these various claims by the Supreme Court of the United States, which might have involved the retention of the property, by the court, for several years. Therefore, it was thought best, by the court and by the parties who are interested in the property, that it should be sold and that the purchaser should pay enough to meet all the claims then definitely ascertained, and that the property should be subject to those adjudicated hereafter.

By the original decree and the amendment, the character of the claims, in either event, remains unchanged.

The fourth exception is, that the bid of one million dollars, for which the mortgaged premises were struck off and sold by the masters, was inadequate. And the reason alleged why so small a bid was made, is, because of the limited time the bidding was kept open. The property was offered for

sale by the masters at 10 o'clock on the morning of the day specified. The advertisement was read, and the bid received. After waiting considerable time, there being quite a number of persons present, and no other bid being received, the property was struck off to the purchasers at that price. This was a matter, to a very great extent, discretionary with the masters. Undoubtedly, if the masters had any reason to suppose that there would soon be an additional and higher bid, they should have kept the bid open and allowed it to have been received. But, if it was clear, from all the attending circumstances that no additional or higher bid would then be made, I do not see that it was incumbent on them to hold the bid open for an indefinite time—an hour, or even half an hour, or any particular time—in order to allow persons afterwards to come in and bid off the property. The sale was advertised the time required by the court. All parties in interest, and especially those who were parties to the suit, are presumed to have been notified of the time and place of sale, and, if they desired the property to bring its value or near it, they had every opportunity of being present, and prepared to bid such a price as would come up to their ideas of its value.

It is clear from the affidavits, which have been introduced, that there was nothing to indicate that an additional bid would be made for the property. It was, accordingly, struck off to the purchasers. It is true, perhaps, that under some aspects of the case, the bid might be considered a small one. That is to say, it might not be regarded as the value of the property; but we have to take into consideration the circumstances connected with the sale. The incumbrances on the property were to a considerable extent indefinite and unknown to the purchasers, and subject to which they had to make their bid. It was believed that the amounts were very large. A great difference exists among counsel as to

the amount which may be allowed. So that it is impossible for the court to disregard this consideration. Then, I think the court ought not to be unmindful of the position of the purchasers themselves. They represent those who have a superior right in equity to this property. They are a committee of the bondholders, most of whom have agreed to the arrangement made under which they have bid this amount for the property; all who are not parties had the option of participating in this arrangement. It is made for the benefit of all. Who has the prior right to the property now? They are not an outside third party who may have purchased it for less than its value, but they are the equitable owners of the property. Besides, it is not because parties may think that property, which has been sold under the order of a court, has not realized its full value, that the court will set the sale aside. The price must be so inadequate as to show that it is not the result of fair dealing and an honest purchase. Now, it cannot be pretended that anything of that kind has occurred here.

Again, the practice of this court has been, where parties come into court and claim that property has been sold at an undervaluation, to require some person of responsibility to make an advance bid such as will authorize the court to order a re-sale. Although this offer has been made in the exceptions, no person has come in, of whom the court can take judicial notice and said that he would give such an advance upon the price as would justify the court in re-selling the property. To be sure, it was stated that a certain capitalist had offered to give $500,000 more. I know nothing of him. I cannot take the statements of counsel made in this general way. One of the counsel, himself, says he would make an advance of $50,000 on the bid that has been offered. I know nothing about his responsibility. I do not know whether he can make good his statement to the court or not.

I, therefore, would not be justified in setting aside the sale on that ground and hold them as the responsible parties who will make such an advance upon the bid as to warrant the court in ordering a re-sale. The fourth exception will therefore be overruled.

The fifth exception is, that after a decision made in this court that the right of redemption did not apply to railroads, there was not sufficient opportunity for the parties in interest to make arrangements to bid in the property at the sale. If that decision was correct, of course the parties were presumed to know the law. In point of fact, the decision in the case of *Brine vs. The Hartford Fire Insurance Co.*, 6 Otto, 627, was contrary to the practice of the Circuit Court of the United States for the District of Illinois for many years. A practice which had been accepted and acquiesced in by the bar, in all cases of foreclosure. After this practice had thus continued, an exception was taken to it, and the Supreme Court of the United States held, in the case cited, that in cases of foreclosures of mortgages on real estate, the law of Illinois was a rule of property in the Circuit Court of the United States, and as that law gave the right of redemption, the sale must be made in the Circuit Court of the United States, subject to redemption. Of course the question immediately came up, whether this law applied to railroads, and with a view of taking the opinion of the court upon that question, it was brought before the Circuit Court of this circuit. It was recently argued, at Chicago, before Judges HARLAN, GRESHAM and BLODGETT, and the court held that, the rule in the case of *Brine vs. The Hartford Fire Insurance Co.*, *supra*, did not apply to the sale of railroads under decrees of the Circuit Court of the United States. This being the law of this circuit till changed by the Supreme Court of the United States, I cannot admit the claim set up in the exception, and therefore the fifth exception will be overruled.

The sixth exception is, that the terms of sale were unusually onerous; as it was required that the person making the bid should deposit $50,000 with the masters, and, if the bid was accepted, the successful bidder should forthwith pay to the masters an additional sum of $50,000, making, in all, $100,000. And, it is said, the premises would have sold for more if these conditions had not been annexed to the sale. As these conditions were imposed by the court, it is rather an attack upon the judgment of the court. It must be remembered that this was a very large property. It was a railroad over 200 miles in length with its rolling stock, franchises and interests of all kinds. There were very large claims which had to be met immediately, including costs and expenses. And it seemed as though such a sum was indispensably necessary in order to meet these claims. It must be recollected, too, that the litigation had been protracted for a number of years; that parties had been performing services without any compensation year after year, lawyers, masters, clerks, etc. And after so long a time and after the performance of so much service, it was thought some provision must be made for its payment, and accordingly $100,000 was not thought inadequate. The language of the original decree was, "that the masters in chancery are hereby authorized and directed to require a deposit to be made by each and every bidder at such sale of $50,000, as security." That was to prevent, what are termed, "straw bids" and prevent delays. It sometimes happens that men who are dissatisfied with the decrees and orders of the court and who claim an interest in the property bid for the purpose of delay, and, when called upon to make their bids good, are unable to do so. The court wanted to prevent anything of that kind and in order to require responsible parties to bid, it was decreed that each bidder must show his responsibility by depositing the sum of $50,000, and then after this deposit was made,

$50,000 additional was required to be deposited by the successful bidder by another article in the original decree, for the same reason. I cannot think that these conditions were onerous or unusual. The sixth exception will, therefore, be overruled.

The seventh exception is, that the masters were unable to inform the purchasers of the amount of claims or debts subject to which the property was sold; and that restrained bidders. The main fact is undoubtedly true. It was impossible for the masters to state precisely the amount of claims upon this property; because, that amount may depend in a very great degree upon the decision of the Supreme Court of the United States. And to obtain that decision, it would have been necessary to suspend the sale for several years. That was something, therefore, which grew out of the necessity of the case and which could not be avoided.

The eighth exception is substantially like the seventh. They, therefore, will both be overruled.

The ninth exception is, a pledge made by Thomas, the trustee of the chattel mortgage, that if the court will again offer the premises for sale, they shall sell for more than a million dollars, and the costs of making the sale. I have already spoken of that and have said that there has been no offer made in such a way that the court can take judicial notice of it and order a re-sale of the property. This promise or pledge has not been made good, and the ninth exception will be overruled.

The tenth exception is simply a reference by Thomas to the orders and decrees of the court which need not be further mentioned.

The eleventh exception, which has been added since the original exceptions were filed, is, that there is a certain committee acting as agents of the bondholders of the railway company; that there was no provision on the subject in the

decree under which the sale was made; that the members of the committee are the parties who bid at the sale, and that the report of the masters does not show who were the principals for whom this property was purchased, and does not state what interest each of the parties interested in the purchase has. I do not know why that is necessary. These purchasers come forward and claim they are a committee of the bondholders. The court may take judicial notice of the fact that they represent the owners of the property. All that the court can require of them is that they shall comply with its orders. They have, so far, complied and shown their ability so to do. Indeed, perhaps in most of the sales which take place, certainly in many, under the decree of the court, the parties who are the nominal purchasers, are often agents representing others. And they are not disclosed until the deed is demanded of the court and, sometimes, not even then. The eleventh exception will be overruled.

I think this disposes of all the exceptions which have been made except what relates to the bankruptcy of the Turners.

The original bill was filed by them. Thereupon, a cross bill was filed by the Farmers' Loan and Trust Company which, as the court found, was the main actor and rightful one, in the litigation as having a prior lien with authority to control it. The court sustained the prior equities of the company as the representative of the bondholders.

After the first cross bill was filed by the Farmers' Loan and Trust Company, the Turners went into bankruptcy and the assignee in bankruptcy was made a party upon the record. Undoubtedly, by the bankruptcy of the Turners, they ceased to have any authority over their property or any litigation then pending. But they had been the actors, originally, in the litigation, and a cross bill had been filed against them by the Farmers' Loan and Trust Company. Under that state of facts, there was an informality or irregu-

larity in one respect in the decree. A default was taken against the Turners as though they were legally *in esse* interested in the litigation, contrary to the fact. But, is the assignee to be heard now and has he the right to say that the decree of the court did not bind him? I think not. If the assignee chose to lay by and do nothing, although made a party, then all that can be said is, that it is a mere irregularity in entering the decree; appearing there in court, made a party to the proceeding in court, it was his right to take the necessary steps to protect the interests of the bankrupts. If he did not choose to do so, certainly it would be unjust that the rights of others should be destroyed or even impaired because of his neglect.

While, therefore, there may be an informality in the decree, still I cannot see that it affects the rights of the Farmers' Loan and Trust Company, the general validity of the sale, or the decree, and, therefore, that objection will be overruled like the others.

In disposing of the various objections that have been taken to this sale, it may be proper to add, in conclusion, that both Thomas and the assignee are parties to the decree, or they are not. If they are, they are necessarily bound by it. If they are not, their rights can be protected by a proper proceeding in a proper court.

For these reasons, the sale must be confirmed.

GEORGE B. SACKET vs. PATRICK McDONNELL *et al.*

M. M. WHITE vs. SAME.

CIRCUIT COURT — NORTHERN DISTRICT OF ILLINOIS — JANUARY, 1879.

1. STATUTE OF LIMITATIONS — REAL ESTATE.—In order to acquire a valid title to land by virtue of the Statute of Limitations, there must have been an open, adverse, and continuous possession for twenty years, under a claim of title to the property.

2. SQUATTER CLAIMS.—A squatter on land cannot avail himself of his occupancy, unless he has denied or impugned the title of the real owner. Mere permissive occupancy will not suffice.

3. LOST AND UNRECORDED DEED.—If proven by parol, the evidence must be clear and convincing.

Two actions of ejectment to recover two pieces of land in N. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$, Section 36, Township 39 North, Range 13 East of Third Principal Meridian, in Cook county, Illinois.

Herbert, Quick & Miller, Josiah H. Bissell, and *Frank H. Collier,* for plaintiffs.

Wm. C. Goudy and *H. M. Shepard,* for defendants.

BLODGETT, J., in charging the jury said: The plaintiffs have each shown a chain of conveyances from the United States to themselves respectively, showing title in fee simple in themselves to the parcels of land they claim. This will entitle plaintiffs to a verdict at your hands unless defendants have made out a better title under the law and the facts in the case. The defense is based upon the following section of the Illinois Statute of Limitations: "No person shall commence an action for the recovery of lands, nor make an

entry thereon, unless within twenty years after the right to bring such action or make such entry first accrued, or within twenty years after he or those from, by, or under whom he claims, have been seized or possessed of the premises, except as hereinafter provided."[1]

To sustain this defense the defendants must show that they or their father under whom they claim, entered into possession under a claim of title adverse to that of the plaintiffs, or of those under whom they claim; that is, there must have been in some form an assertion on the part of the elder McDonnell, when he took possession, that he claimed title to this property as against all other titles.[2]

The Statute of Limitations invoked in this case does not give a person title who merely enters upon another man's land, and remains there twenty years, unless he claims a right of entry by virtue of his own title so as to give the owner an opportunity of trying titles with him. Thus, if a mere squatter, as they are popularly termed, (that is, a person who enters without color of right) enters upon your land, claiming no title as against you, but simply moves on to the land on the assumption that you have no immediate use for it and without impugning your title, and you acquiesce in his remaining there,—do not drive him off or sue him in ejectment or trespass,—he gets no title as against you by such permissive occupation. To allow one thus to become the owner of another man's land, would be an abuse of good nature and punish a charitable man, and would be a most unjust requital for the kindness the occupant received at the hands of the owner, and while the law favors statutes of repose which end litigation and strife by lapse of time, yet

[1] Illinois Revised Statutes, Chapter 83, Section 1.

[2] *Kerr vs. Hitt*, 75 Illinois, 51; *McClellan vs. Kellogg*, 17 do. 498; *Jackson vs. Berner*, 48 do. 208.

a party asserting a title like this set up by the defendants must by his proof bring himself clearly within the provisions of the law on which he relies. Record titles deduced by a connected chain of conveyances directly from the Government, should not be set aside, except upon clear and satisfactory evidence. * * * *

Defendants have introduced evidence tending to show that McDonnell had in his possession during some part of the time he occupied the land a deed from one Burke conveying the land in question along with other lands to McDonnell. This deed is not produced and the undisputed evidence is that it was not recorded. The rule is that when a deed has been destroyed or lost without the fault of the party who seeks to use it in evidence, parol evidence of its contents may be given. The defendant's testimony tends to show that there was such a deed in existence, and that after due search it cannot be found, and evidence has been given tending to show its contents. This deed was not recorded and the circumstance that an intelligent man who had a deed for a tract of land so valuable as this grew to be long before McDonnell died, and yet did not record it, may be considered as tending to raise a doubt as to whether the paper these young people saw in their father's possession was really a deed of the title to this land. While, as I have said, the law allows parol evidence of the contents of a lost or destroyed deed, the testimony should be of a very clear and convincing nature in order to justify a jury in acting upon it, and setting aside a valid record title upon such proof. The deed, if you are satisfied there was one, and that it conveyed the land in question is to be considered for two purposes: *First*—As a title adverse or hostile to the title claimed by plaintiff. For this purpose it was not necessary that the deed should have been recorded, if you are satisfied from the proof, that McDonnell when he entered, claimed

title as against all others by virtue of this deed. *Second*—If the deed in question conveyed eighty acres or more of land, including this land in controversy, and McDonnell took possession of and occupied a part of the tract conveyed by the deed, claiming title to the whole, such occupation would be a good possession of the whole. But you must be satisfied that the deed actually purported to convey the fee of the land in controversy, and that in occupying a part, McDonnell claimed the whole. Burke himself may have had only a squatter's title. He may have made some improvements and conveyed to McDonnell simply his improvements for a few dollars, without pretending to convey anything but his squatter rights.

If, then, you are not satisfied from the proof that McDonnell entered upon this property claiming an adverse or hostile title to the plaintiff and had continued in the open and adverse possession for twenty years before the commencement of this suit, defying, as it were, the plaintiff's title and right to the property, then plaintiff will be entitled to recover, because the burden of proof is thrown on the defendants to make out their title as against the title of plaintiffs. While, if you believe from the proof that defendants' father did enter upon the property, asserting a hostile title to plaintiff and continued his possession twenty years before this suit, defendants must have a verdict at your hands. If the proof satisfies you that McDonnell entered as a mere squatter, intending to stay only so long as the lawful owner should permit, then plaintiff should have a verdict.

Verdict and judgment for plaintiff.

ROBERT J. ROBERTS vs. GEORGE W. SHELDON *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JANUARY, 1879.

1. TRADE MARKS—"PARABOLA."—The word "Parabola" used as the name of needles not being descriptive of any peculiar quality of the needles was *held*, a valid trade mark.

2. INFRINGEMENT.—"William Clark & Sons' Parabola Needles" is an infringement of "Roberts' Parabola Needles."

Goodwin, Offield & Towle, for complainant.

Percy L. Shuman and *E. G. Asay*, for defendants.

BLODGETT, J.—This case comes up on application by the plaintiff for an injunction against the defendants, and on the demurrer of one of the defendants, George W. Sheldon, to the bill. The bill states in substance, that the complainant is a manufacturer of needles, in England, and a subject of that country, but that he is domiciled in this country, and finds here a large market for his manufactured goods; that as early as 1866, he adopted as a trade mark, the word "Parabola," which was printed on the outside of the packages containing his needles; that his goods have acquired a wide celebrity under the name, and an extensive sale; that he has expended large sums of money in advertising and introducing his goods, and that he is entitled, by virtue of having been the first to adopt this word as a trade mark for needles, to the exclusive use of it. He also alleges that the firm of William Clark & Sons, who are also manufacturers of needles in England, and are competitors of his in the American market,

have put upon the market packages of needles in imitation of the packages of complainant's needles, and have used and are using the said word, "Parabola," to designate their needles, and are now introducing their packages, marked with complainant's trade mark, upon the markets of this country, and especially of the city of Chicago, whereby they are impairing the trade of the complainant, and prays for an injunction.

The defendant makes two points in the demurrer to this bill; the first is, that the word, "Parabola," is a description of the peculiar quality possessed by these needles, namely: that the eye of the needle is constructed in the form of two parabolic curves brought together at their open ends; and invokes, upon this statement of fact, the well known rule in the law of trade marks, that a person will not be allowed to use, or adopt as a trade mark, any word which expresses the quality of the goods, such for instance, as, "best," "extra," or "superfine," or any of these adjectives. There are a large number of cases sustaining this position, and the rule, as a principle of the law of trade marks, is undoubtedly well established.

The second objection taken to the bill by the demurrer is, that the packages put up by Clark & Sons, and sold by the defendant, Sheldon, here as their agent, while they use the word "Parabola," at the same time are not calculated to deceive the public, because they say that the needles are manufactured by William Clark & Sons, and that the public are all notified that the needles made by the defendants, Clark & Sons, and sold by Sheldon, are "William Clark & Sons' Parabola Needles," and not the "Roberts' Parabola Needles;" and upon this ground it is claimed, there is no danger of the public being imposed upon, or deceived by reason of the defendants' use of the word.

In answer to the first point, namely, that the eye of this

needle has a parabolic form, it perhaps would be enough to say that there is nothing upon the package tending to show that the word "Parabola," has any reference to the eye of the needle. It might as well be said, if the needle was a little curved, that it was a section of a parabolic curve. But I think it is answer enough to this position, to say that there is nothing on the envelope or label of the package, which says or tends to show that the eye of the needle is claimed to be made in the shape of a double parabola, or two parabolic curves, and when inspected under the glass, it would seem to me, as a question of fact, that the eye of this needle is elliptical rather than parabolic in shape. The word "Parabola," it seems to me is, as stated by the complainant, an arbitrary term adopted by complainant to distinguish his needles from those of other manufacturers, and he had a right to so select and apply it.

It is frequently the case that by close analysis and ingenuity, you can find in almost any trade mark a designation of some quality connected with the goods. An analogous case to this was before this court, and heard before the learned Circuit Judge and myself, four or five years since, in regard to what is known as the "Cream Baking Powder." The firm of Steele & Price filed a bill against one Richards and his associates, stating that Steele & Price had adopted a trade mark to designate a certain baking powder which they manufactured, called "Cream Baking Powder." The defendant had also commenced manufacturing baking powders and was putting upon the market a commodity under the name of "Star Cream Baking Powder," and the question was there made, that the word "Cream" had reference to the quality of the baking powder; that is, that it was the best in the market; the *Cream* of baking powders. The position was argued very strenuously by the defendant's counsel, that it was a term of quality, not an arbitrary term; but in that case,

which was decided by Judge DRUMMOND, the court held that the defendants had no right to use the word "Cream," and that any prefix, or suffix, they used with it, would not give them the right to use it in connection with the manufacture of goods similar to those made by the complainants; that the complainants had the exclusive right to use that term to designate goods of their manufacture.

It seems to me the case was, in all respects, analogous to this. I do not recollect that the case has ever been reported. An oral opinion was delivered by Judge DRUMMOND immediately on the close of the argument, and, I presume, it never got into the Reports.

In regard to the last point made, that by reason of the defendants using their own name upon the wrapper or envelope, the public are not deceived, it would, perhaps, be enough to say, that when goods acquire a specific name, the purchaser rarely looks to see who has manufactured the goods by that name. As, for instance, if, as a matter of fact, these needles have acquired, among the trade, and among consumers or users, the designation of "Parabola," to such an extent that the purchaser would simply ask for "Parabola needles," he might be supplied with the parabola needles manufactured by Clark & Sons, instead of those manufactured by the complainant, to the direct injury of the complainant and the abridging of his trade.

Another case very analogous to this, upon this point, was also before this court. A suit was brought by Proctor & Gamble against McBride & Co., of this city, to enjoin the use of a trade mark, which had been adopted by Proctor & Gamble, for a certain brand of soap, which they manufactured. Proctor & Gamble claimed that they had introduced to the public, under a trademark of their own, a brand of soap under the term and designation of "Mottled German Soap," and they had adopted as a trade mark upon their

packages, those words with a circle, with a moon and stars in the middle, The defendants, McBride & Co., who were manufacturers in this city, had put upon the market a brand of soap which they termed "S. W. McBride's German Mottled Soap," and they had marked these words upon the outside of their packages in combination with a crescent within which was a single star instead of a number of stars. That, I think, was the distinction, so that it presented a stronger case for the defendants than this, because we find upon inspection that the defendants' and complainant's labels are almost identical to the eye; that is, the reading upon them is essentially the same. In one case, it is "Roberts' Parabola gold burnished sharps." Upon the other label or package, upon the same colored paper, and with the same colored ink, is printed, "William Clark & Sons' Parabola gold burnished sharps," so that there is a similar use of terms or letters, and the same use of the word "Parabola," and the only distinction is that between "Roberts" and "William Clark & Sons." Now, in the case I mentioned, the defendants had departed much more widely from the complainant's trade mark. They had changed the arrangement of the words so, instead of its being "Mottled German Soap," it was "German Mottled Soap," and instead of a circle containing several stars, it was a crescent containing a single star, prefixed by the name of each maker; and it was argued in that case, there could be no possibility of intelligent consumers being deceived. So strong was the case made before me on an application for an injunction, that I refused the injunction; but after the proofs were taken, and the case brought to hearing before Judge DRUMMOND, he sustained the infringement, and ordered a perpetual injunction against the defendants. It was also shown in that case that "Mottled German Soap," or "Mottled Soap," had been in common use in the trade for nearly fifty years, and that "Mottled Soap" was a commodity

well known to the trade; but Judge DRUMMOND sustained that trade mark as the exclusive property of the complainant, and held that the defendants infringed.

In the light of that case, which has never been questioned, it seems to me that the mere fact that the defendants in this case have used the words, "William Clark & Sons," so as to designate them as the manufacturers, does not defeat the complainant's right to the exclusive use of this word "Parabola," as designating his manufacture, and that there is a liability to impose upon the trade and on the public, from which the complainant has the right to be protected.

With these views, I shall order an injunction on the complainant's filing a bond in the penal sum of five thousand dollars, conditioned for the payment of any damages which the defendant may sustain by reason of the issuing of the injunction, and also require complainant as a condition of the granting of the injunction, to put in his proof within thirty days after the answer in this case is filed.

See, also, *Williams vs. Adams*, *post*, page 452. [*Reporter.*

UNITED STATES vs. CHRISTIAN SALENTINE.

District Court—Eastern District of Wisconsin—January, 1879.

1. New Trial—Misconduct of Juror.—A new trial will not be granted on the ground of misconduct of a juror, when it appears that the party asking for such new trial participated in and was a party to such misconduct.

2. The defendant was tried for manufacturing illicit spirits. During the progress of the trial one of the jurors, contrary to express instructions of the court, which were known to the defendant, visited the rectifying house of the latter, and was by him shown through it. Nothing was said concerning such misconduct on the part of the juror until after the close of the trial. The verdict being against the defendant, a motion was made for a new trial because of the misconduct of the juror: *Held*, that under the circumstances, the motion must be overruled.

3. Discussion of cases, where new trial has been granted for misconduct of jury.

The defendant having been convicted of violation of certain provisions of the internal revenue law, a motion for new trial was made on the ground of misconduct of one of the jurors.

G. W. Hazleton, U. S. District Attorney, for United States.

Murphey & Goodwin, for defendant.

Dyer, J.—The question bearing upon the right of the defendant to a new trial arises upon the misconduct of one of the jurors while the trial of the cause was in progress. At the beginning of the trial the jury were cautioned against having any conversation with any person about the case, and against allowing any person to approach them for the pur-

pose of having such conversation, and against permitting any conversation relating to the case to be had in their presence. The admonition was pointedly given and must have been well understood by the jury and by all parties present. At a subsequent stage of the case the defendant, through his counsel, made application for an order granting to the jury leave to visit and examine his rectifying house, where it was alleged illicit spirits had been manufactured. His application was denied, and the denial was accompanied with observations on the part of the court, which must have given the jury and all parties interested distinctly to understand that the case was to be heard and determined upon the evidence adduced in court, and that no other sources of knowledge or information were to be consulted. Nevertheless, before the conclusion of the trial, one of the jurors, without the knowledge or leave of the court, visited the rectifying house and made extensive examinations of the same in company with the defendant. The circumstance was first brought to the knowledge of the court after verdict, by affidavits of the facts made by the defendant and certain of his witnesses. Proceedings were at once taken for an investigation of the conduct of the juror, which resulted in the imposition of such punishment as the court at the time thought his misconduct warranted. This act of the offending juror has been earnestly urged as ground for a new trial.

Invoking, as counsel did in support of their view, the rule which limits the inquiry of a juror in the case he is called to hear to the evidence adduced at the trial, unless otherwise ordered by the court, and also those general principles regulating jury trials which are essential to a pure and impartial administration of justice, and impressing also upon the attention of the court the circumstance that there had been such transgression by the juror as merited, and made it the duty of the court to impose, suitable censure and punish-

ment, my mind was at the time strongly impressed by the argument which counsel for defendant made upon this branch of the case. In testing its soundness as applicable to the case at bar, it seems essential that we look closely into the particular circumstances and facts connected with the admitted misconduct of the juror.

The material portions of the affidavit made by the defendant and presented to the court as the basis for proceedings against the juror, are as follows:

"That on the 16th day of April, A. D. 1878, at or about the hour of one P. M. of said day, said Horace De Long, juryman as aforesaid, came to the rectifying house of M. J. Salentine, No. 227 Reed street, in said city, which is the rectifying house spoken of in the testimony introduced in the trial of said action, and which contains the tubs and still where the illicit distillation of spirits is alleged to have been carried on; that I saw the said De Long inside of the said rectifying house when I came to the place at said time; he then stated that he had come into the establishment to look over the same and see how things were, or words substantially and to that effect. He then asked me where the barrel of wine was lying that had been spoken of in the evidence during the trial, and I showed him the place; he asked me what the big tubs were for which stood in the rectifying house, meaning the receivers; he then said, in substance, that he wanted to go into the still and see where the mash was alleged to have been made; he then went into the still room; he looked at the dumping holes leading through the still room floor into the tubs, and said, 'that is the place where they said you made your mash,' and I said 'yes;' he then looked at the still and the other tubs in the still room. * * * Said De Long then went into the stable connected with said premises, and asked me where the place was where the jug of liquor was hid; then the said

juryman, saying that he wanted to see the place where the molasses was laid, went to the rear of the store on Virginia street, where it was proven that the molasses was stored; he looked into said store room and examined the side walls in front, and remarked that it was a poor hiding place. The said juryman then returned, as I remember, into the still, and from there the said juryman went up stairs and looked about upon the second and third floor of said establishment; he examined the iron basket of the still spoken of in testimony, and also the top of the column in the still; he and I then went back into the store."

The affidavit of the juror, made in the proceeding against him for contempt, varies in some particulars from that of the defendant, but it is in substance an admission of the alleged misconduct, and shows that the defendant participated with him in the examination of the premises, and pointed out to him various places and objects in the rectifying house referred to in the testimony. For the purposes of the pending question of a new trial, we may accept the affidavit of the defendant as giving a truthful statement of the occurrence.

The facts then being as stated by the defendant, the question is, do they entitle him to a new trial?

That the rule touching the effect of misconduct of a juror upon a verdict is a strict one, cannot be denied. That it is also a salutary rule, and one to be faithfully observed as essential to the purity of jury trials, must without hesitation be admitted. The books are full of cases where the rule has been enforced. And, although there is some disagreement in the authorities on the point, I think the weight of authority is, that it is not necessary in order to justify the court in setting aside a verdict for irregular conduct of a juror, to show affirmatively that such conduct influenced the jury or affected the verdict. The misconduct

of a juror, if it occurs without the knowledge or participation of the party litigant, taints the verdict; that is, provided it was of such a character that it might have had an undue influence.

Says Judge CLIFFORD, in *Johnson vs. Root*, 2 Clifford, 128:

"Irregularity on the part of the party charged or of the jury, must be satisfactorily proved in order to lay a foundation for the interposition of the court, but when the irregular conduct is established, it is not necessary that it should certainly appear that it influenced the jury. In that state of the case it is sufficient that the irregularity appears to be of a character that it might have affected the impartiality of the proceedings." Such was the rule laid down in *The Commonwealth vs. Roby*, 12 Pickering, 520, and it appears to be correct. In that case the court says that where there is an irregularity which may affect the impartiality of the proceedings, as where meat and drink or other refreshments have been furnished by the party, or where the jury have been exposed to the effect of such influence, as where they have improperly separated themselves or have had communications not authorized, inasmuch as there cannot be any certainty that they have not been improperly influenced, the proper and appropriate mode of correction or relief is by undoing what has thus improperly and might have been corruptly done.

Text writers have stated the rule as follows:

"That whenever it seems satisfactorily to appear that the jury were influenced by improper motives, or that they acted corruptly or under restraint, and it clearly appears that a fair trial has not been had, the verdict will be set aside and a new trial granted. Any improper interference with the jurors may afford sufficient grounds for granting such a motion, and it is not necessary that the attempt to influence the jurors should be made by one of the parties, nor even

by his agents. It is sufficient, if it clearly appear that it was done in his behalf, and it is never necessary to show that the misconduct controlled or determined the verdict, provided it was of a character that it might have had an undue influence."

In *Knight vs. Inhabitants of Freeport*, 13 Massachusetts, 218, the plaintiff's son-in-law said to one of the jurors that the cause was of great consequence to him; that he should have to pay the costs if the cause should go against the plaintiff, and that the defense of the action was a spiteful thing on the part of the defendants.

On motion of defendants a new trial was granted; the court remarking that "too much care and precaution cannot be used to preserve the purity of jury trials. The attempt to influence the juror in this case was grossly improper, and ought to be discountenanced. It is not necessary to show that the mind of the juror thus tampered with was influenced by the attempt. Perhaps it is not in his power to say whether he was influenced or not. If he was, there is sufficient cause to set aside the verdict, and if he was not, and the party who has gained the verdict has a good cause, he will still be entitled to a verdict upon another trial. We cannot be too strict in guarding trials by jury from improper influence. This strictness is necessary to give due confidence to parties in the results of their causes, and every one ought to know that for any, even the least intermeddling with jurors, the verdict will always be set aside."

As illustrative of the extent to which the courts go in setting aside verdicts for improper attempts to influence jurors, the following cases are in point: *Hamilton vs. Pease*, 38 Connecticut, 115; *Perkins vs. Knight*, 2 New Hampshire, 474; *Bennett vs. Howard*, 3 Day, 223. See, also, *Sargent vs. Roberts*, 1 Pickering, 337; *Dana vs. Roberts*, 1 Root, 134; *Farrar vs. Ohio*, 2 Ohio State, 54; *Riley*

vs. The State, 9 Humphrey, 646; *Foster vs. Brooks*, 6 Georgia, 287; *State vs. Andrews*, 29 Connecticut, 100, and many other cases which might be cited.

In this connection it may be observed that in *McIlvaine vs. Wilkins*, 12 New Hampshire, 474, the court, in discussing this subject, say, that "scattered throughout the reports there are far more cases than there should be of applications for new trials, founded upon evidence tending to show sometimes attempts by a party to prejudice a jury in his favor, and sometimes conduct in jurymen indicative of a forgetfulness of the important responsibilities resting upon them."

And Mr. Hilliard says, in his work on New Trials,[1] that the weight of authority would seem now to be that conversation with jurymen, more especially, unless held when they are together, is not ground for a new trial, citing *Davis vs. Taylor*, 2 Chitty's Reports, 268; *Parker's Case*, 2 Rolle, 85; *Hall's Case*, 6 Leigh, 615; *Luster vs. The State*, 11 Humphrey, 169; *Rowe vs. The State*, 11 Humphrey, 491.

Visiting the scene of the *res gestæ* by jurors, without permission of the court, and with a view to obtain information touching the facts of the case on trial, or for explanation of testimony, is ground for a new trial. Such, in effect, was the ruling in *Eastwood vs. The People*, 3 Parker's Criminal Reports, 25; *Ruloff vs. The People*, 18 New York, 179, and *Deacon vs. Shreve*, 2 Zabriskie, 176.

In the light of the authorities to which I have referred, and many others to which reference might be made, if it appeared in the case at bar that the juror held conversations with other parties than the defendant about the merits of the case while the trial was in progress, or visited the defendant's rectifying house for the purpose of examining the same, without defendant's knowledge or co-operation, I should

[1] Hilliard on New Trials, Chapter X., Sec. 11.

have little hesitation in setting aside this verdict. The question now is, is the defendant in a position to invoke the application of the rule which gives to a party, presumably prejudiced by the misconduct of a juror, the benefit of a new trial. He had knowledge of the refusal of the court to permit the jury to visit the premises. Yet, finding the juror there while the trial was in progress, he conducted him over the premises, and, as appears by his own sworn statement, pointed out localities and objects concerning which testimony had been given. He knew that the court had forbidden the jury to have conversations with persons concerning the case, yet, according to his own affidavit, he held such conversation with the juror while accompanying him through the rectifying house. In view of what had transpired in court in his presence, and in view of the statement in his affidavit that the juror told him that he did not want any one to know he had been at the rectifying house, it is to my mind clear that the defendant knew that the conduct of the juror was a violation of his duty, and was in disregard of the orders of the court. Yet he made no report of the transaction to the court, nor even to his counsel, but sat silent and permitted the trial to proceed without complaint until after verdict, when he makes complaint in the form of a motion for a new trial, on the ground that he was prejudiced by the misconduct of the juror, in which he participated, and to which he was a party.

I have examined with care all the cases cited by counsel, and many more bearing upon this question, and I have been unable to find a case in which a new trial was granted for misconduct of a juror, in which the party asking for a new trial participated. The cases in which such misconduct was held ground for a new trial were, so far as my observation extends, where the misconduct was between the juror and a third party, or between the juror and the successful party in

the litigation, and of which the losing party was at the time ignorant, and with which he was in no manner connected. Now, although "the utmost precaution should be observed to prevent any attempt to forestall the judgment or to bias the mind of a juror in reference to the merits of an issue which he is called on to decide," and although "all trials by jury ought to be effectually guarded against the exertion of every species of improper influence," the question is, whether, when a defendant makes himself a party to the misconduct of a juror, he can sit silent until verdict rendered, and then if the verdict shall be against him, can be heard to urge such misconduct as a ground for setting aside the verdict. As, for example, suppose a juror communicates a willingness to accept a bribe, and the party pays him a bribe, and the bribe proves ineffectual, and there is an adverse verdict, can the party who has thus dealt with the juror ask for the benefit of a new trial, basing his application upon the corrupt act of the juror? As I understand the rule upon this subject, it is enforced for the benefit and protection of those who are themselves innocent of any participation in the misconduct complained of.

It is true that in the present case the juror's visit to these premises was not brought about, nor originally induced, by any act of the defendant. The juror was there of his own volition, and was there when the defendant first met him; but the defendant at once lent his encouragement and co-operation to the act of the juror, and, as I have said, accompanied him over the premises, pointed out different objects upon the premises to which the testimony on the trial related, and conversed with him about particular parts of the establishment which they were then mutually observing. Clearly both parties—the juror and the defendant—were equally *in flagrante delicto*. For this offense against the proprieties of judicial investigation, punishment has been inflicted upon

one; and now to grant a new trial because of such offense, would be to reward the other, when both are alike culpable. For I cannot but regard both as alike at fault, since the defendant, finding the juror on the premises, actively aided and facilitated him in his examination of the scene of the *res gestæ*. It is impossible for me to believe that the defendant supposed that the juror had a right at that time to visit and examine the establishment, and his subsequent silence touching the occurrence until after the verdict, looks strongly like a purpose, originally, not to divulge the circumstance unless the verdict should be unfavorable. By his own course of action as a participant in the misconduct of the juror, I think he has foreclosed his right to ask that the verdict be set aside because of such misconduct. No other conclusion is, in my judgment, reconcilable with a regular and proper administration of the law, and I find no authority that supports a contrary determination in such a state of the case.

Motion for new trial denied.

The test of prejudice to a party from misbehavior of a juror is this: Was his misbehavior such as to make it probable that his mind was influenced so as to render him an unfair and prejudiced juror? If the misbehavior appear, the disclaimer of the juror should be wholly disregarded. And it is of no importance whether or not the court thinks the verdict was right. *Pool vs. C., B. & Q. R. R. Co.*, 11 Reporter, 823. [*Reporter.*

THE NORTH WISCONSIN RAILWAY COMPANY vs. THE BOARD OF SUPERVISORS OF BARRON COUNTY.

CIRCUIT COURT—WESTERN DISTRICT OF WISCONSIN—FEBRUARY, 1879.

IN EQUITY.

1. LAND GRANTS—PATENTS—TITLE—TRUSTS—TAXATION.—Under a Government land grant to a railway company, the patents for the land were to be issued, *pro tanto*, on the completion of any twenty consecutive miles of road, and it was provided in the grant that the lands thereby granted should, when patented, be subject to the disposal of the company, for the purposes of construction and equipment and no other: *Held*, that this did not create the relation of trustee and *cestui que trust*, between the railroad company and the Government as to lands so patented, but that the patents when issued vested the complete title in the company.

2. TAXATION.—Such lands upon the issuing of the patents become subject to taxation.

3. *It seems* that the remedy of the Government in case of misapplication of such lands, or their proceeds, would be by proceedings against the company or its officers, and that the titles of purchasers or mortgagees of the lands could not be affected.

Motion for temporary injunction to stay collection of tax, etc.

Isaac C. Sloan, *S. U. Pinney*, and *J. C. Spooner*, for complainant.

Vilas & Bryant, for defendant.

BUNN, J.—The complainant's counsel to sustain their application for an injunctional order restraining the collec-

tion of the taxes upon the railway company's lands, have pressed with great and persistent force the argument, that these lands are held by the company in trust for the building of the road which the company by the acceptance of the grant from the state has undertaken to construct. And though it may be difficult to answer satisfactorily the complainant's argument, I must say that the court is not convinced by it that the lands are exempt from the ordinary burdens of taxation incident to land in general.

If the lands are held in trust for the Government, then I think there is no escape from the conclusion that they cannot be taxed, for I cannot see, in such a case, that it makes any difference whether the United States hold the legal title or hold the beneficial interest, the legal title remaining in the company which holds it as trustee for a certain purpose. In either case the land could not be taxed by the state. But I think the true and only answer to the complainant's argument is that the lands are not held in trust either for the United States or for the state. The law, by force of which the exemption is claimed, is found in Sections 7 and 8, of the Act of Congress of May 5, 1864, which are as follows:[1]

SEC. 7. That whenever the companies to which this grant is made or to which the same may be transferred, shall have completed twenty consecutive miles of any portion of said railroads supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turn-outs, watering places, depots, equipments, furniture and all other appurtenances of a first class railroad, patents shall issue conveying the right and title to said lands to the said company entitled thereto, on each side of the road, so far as the same is completed, and coterminous with said completed section, not exceeding the amount aforesaid, and patents shall in like manner issue as each twenty miles of said road is completed: *provided*, however, that no patents shall issue for any of said lands unless there shall be presented to the Secretary of the Interior, a statement verified on oath or affirmation by the president of said company and certified by the Gov-

[1] United States Statutes at Large, Vol. XIII, p. 66.

ernor of the State of Wisconsin, that such twenty miles have been completed in the manner required by this act, and setting forth with certainty the points where such twenty miles begin and where the same end, which oath shall be taken before a judge of a court of record of the United States.

SEC. 8. That the lands hereby granted shall, when patented, as provided in Section 7 of this act, be subject to the disposal of the companies respectively entitled thereto, for the purposes aforesaid and no other, and the said railroads be, and shall remain public highways for the use of the Government of the United States, free from all toll or other charge, for the transportation of any property or troops of the United States.

My opinion is that this language should not and cannot be construed as creating the relation of trustee and beneficiary or *cestui que trust* between the railway company and the United States as to the lands conveyed by patent to the company under Section 7.

If the railway company holds the lands as an ordinary trustee, it takes a bare legal title, the real beneficial interest still remaining in the Government. But it seems to me this is not the necessary or fair construction of the language of the two sections.

It will be noticed that the construction, completion and full equipment of twenty consecutive miles of road by the company is a condition precedent to its right to a conveyance of any portion of the land, and that upon such completion and equipment the law gives the company a right to a conveyance of just such proportion of the entire grant as the distance completed bears to the entire line of road; and upon a similar completion of another like number of miles a further conveyance of a like proportion of the land granted. So that it is evident that the company before it is entitled to any conveyance of the land must in an important sense earn a right to the land by a performance of the necessary labor and an outlay of the necessary amount of money. And it seems to me that this condition being performed and the conveyance made the company takes some-

thing more than a bare legal title—that it takes the legal title coupled with the beneficial interest in the property; but the company being subject, of course, to all the conditions of the grant; one of which, in my judgment, is to faithfully apply the proceeds of the sales of the lands patented to the further construction of the road.

I trust I do not misapprehend the real question which is, I take it, not so much whether the technical relation of trustee and beneficiary exists between the company and the Government, as whether the Government, as to the lands patented to the company, still retains a substantial and beneficial interest and property, or whether that has gone with the legal title to the company which has earned it by a compliance *pro tanto* with the conditions of the grant. And the conclusion which I have come to is, that the Government after the patent issues to the company has no longer any property interest, legal or equitable, in the land.

This, it seems to me, is the fair construction of the language, and best comports with the spirit and purpose of the act. The language of Section 7 is, that "*patents shall issue conveying the right and title to the said lands to the said company entitled thereto.*" The "right and title" to the lands includes the beneficial interest as well as the legal title, and is just what is ordinarily conveyed by a patent from the Government or from the state.

Again, Section 8 says: "*The lands hereby granted shall, when patented, be subject to the disposal of the companies respectively entitled thereto, for the purposes aforesaid, and no other.*"

It is upon this provision mainly that the claim for exemption is based. It is evident, however, that the exemption from taxation of so large a quantity of land for an indefinite period should not be sustained upon any doubtful construction of the statute. And the construction which finds in

this language the creation of a trust in the ordinary legal sense, and which leaves the beneficial interest in the land, after the issuing of the patent to the company, in the United States, is, in my judgment, not only not at all necessary, but is not the result of a fair interpretation of the language used.

It seems to me what the language fairly means is this: That upon the conveyance by patent of the lands to the company upon its earning the right to such conveyance by the completion of the required section of road, the company has the absolute right to dispose of the lands, either by sale or mortgage, for the purpose of raising money to prosecute the enterprise of building the remainder of the road, and for this purpose has all the power and right that any owner of land in his own right has to convey the entire interest, as well equitable as legal, to the purchaser, who takes a perfect and full title to the land discharged of any claim or interest which the state or United States had in it previous to the issuing of the patent. And that the company is then under firm and solemn obligation, by accepting the grant subject to all the conditions contained in the act of Congress, to faithfully apply the proceeds of sales to the purposes aforesaid; that is to say, to the construction of the road according to the terms and conditions of the grant.

Just what is the extent of the remedy which the state or general Government might have against the company in case of a misapplication or attempted misapplication of the funds arising from sales of lands, whether a suit in equity to restrain such misapplication, or a proceeding to take away the chartered privileges of the company, or both these with others, it is not necessary here to determine.

Probably both of these remedies might be resorted to, and in case of disobedience to the orders of the court, the officers and agents of the corporation so offending might be attached.

It is enough to say that in the opinion of the court the remedy would be of some such personal character rather than one reaching to and affecting the title to the land after it should have been sold by the company and gone into the hands of purchasers who had paid full value for it.

The obligation on the part of the company to faithfully apply the proceeds of sales to the construction of the road, is of the same character as the one to keep the railroad forever open to the use of the Government as a public highway, free from all toll or other charges, for the transportation of the property and troops of the United States. Both, in my judgment, are personal and corporate obligations, to be enforced as other obligations of like character, and do not confer a property interest in the land after it is sold to the company, or in the road itself when completed. The legislative and judicial powers are ample for the enforcement of these several obligations, and for the protection of the rights of the Government growing out of them.

It was urged, on the argument by complainant's counsel, that a purchaser of the lands from the company would take with full knowledge of the law, and of the conditions upon which the title vested, and of the claim upon the land which the Government would retain until the road should be completed. It is undoubtedly true that the purchaser would take with full notice of the law and of the company's title, but instead of this being an argument to sustain the complainant's position, I think it is one against it. Because the purpose of the grant being the construction of the road, and the means of carrying out that purpose being mainly the sale or mortgaging of the lands to raise the necessary funds, it is not to be supposed, without the clearest evidence, that Congress would provide for the company's conveying an imperfect title or one which should be liable to be defeated by the subsequent misconduct of the officers of the corpora-

tion, or a failure on their part to comply with the conditions of the grant.

Of course, no sane business man would pay the full value for land on a purchase, or loan money upon a mortgage of the land, when he knew that his title was subject to be defeated by the subsequent acts or misconduct of persons, over whom he had no control, in misappropriating the proceeds of the sale or otherwise failing to comply with the law. If such were the law, no person would buy or part with money on a mortgage, and so the very object of the grant, which is the building of the road, would be defeated.

The purchaser could not be supposed to know what the secret intent of the officers of the corporation or their successors in office might be, and that intent even might be formed after the sale was made.

The law expressly provides that the land patented shall be subject to the disposal of the company, and it was undoubtedly intended that the sale or mortgaging of the lands patented for the purpose of raising money should constitute a part of the means by which the road was to be constructed.

I take it, then, to be clear that the purchaser or mortgagee for value would take a full and complete title. And this is entirely incompatible with the idea of the Government having any beneficial interest or property right of any kind in the land. This same question was made in *The West Wis. Ry. Co. vs. The Board of Supervisors*, 35 Wisconsin, 257, and the same view taken.

The application for a temporary injunction is denied. But in view of the importance of the question involved, the restraining order heretofore made may be modified, so as to apply only to proceedings on the taxes levied previous to the year 1877, and so as not to affect any re-levy or re-assessment under the state laws of any of the taxes heretofore levied. And so modified, such restraining order may stand until the

beginning of the June Term, 1879, to the end that the cause may be heard on bill and answer by a full bench.

At the December term, 1879, the same cause came on to be heard on the merits, upon bill and answer, before Judges DRUMMOND and BUNN, and the same conclusion was reached, and the complainant's bill dismissed. [*Reporter.*

THE UNITED STATES vs. THE BEEF SLOUGH MANUFACTURING, BOOMING, LOG-DRIVING, AND TRANSPORTATION COMPANY *et al.*

CIRCUIT COURT—WESTERN DISTRICT OF WISCONSIN—FEBRUARY, 1879.

1. NAVIGABLE RIVERS—OBSTRUCTIONS.—In the absence of specific legislation by Congress, the regulation of a navigable stream is left entirely with the state, and the Government cannot by bill or information prevent or abate any obstruction.

2. Where Congress has passed acts for the survey and improvement of a navigable river, the court will not interfere with the existing use of the stream, unless it clearly appears that the acts complained of necessarily interfere with the operation of such legislation.

Information and bill in chancery to abate the works of the Beef Slough Company, above the mouth of the Chippewa river in Wisconsin; and to prevent the running and driving of logs in said river.

Defendants filed a demurrer.

W. F. Vilas and *L. S. Dixon*, for United States.

Thos. Wilson and *S. U. Pinney*, for defendants.

DRUMMOND, J.—The controversy in this case arose on a demurrer to the amended bill of the plaintiffs. The case was argued before me some time since on a demurrer to the original bill, and the demurrer sustained, with leave given to amend. Accordingly an amended bill has been filed, and a demurrer has been again interposed, and the question is as to the sufficiency of this amended bill. The case, as it was originally presented to the court, has been, to a very great extent, re-argued, and the court has been called upon to reconsider its ruling upon the original bill.

On reconsideration of the case, we see no good reason to change the ruling which was originally made. The bill proceeds upon this theory on the part of the Government: That the Chippewa river is a navigable stream, made so by acts of Congress, and that the defendants have placed obstructions in that river under the laws of the state, or by their own wrongful acts, without authority from the state. The original question was, admitting that the Chippewa river was a navigable river, free to all persons under the acts of Congress, whether, in the absence of any specific legislation upon the subject, the Government could by bill or information, prevent persons from obstructing the navigation of the river, either under the authority of the state, or without such authority.

Independently of some acts of Congress which will be hereafter referred to there was no specific legislation in relation to the Chippewa river. There was no act of Congress which provided in what manner bridges, draws or booms should be constructed or placed, or how any of the various structures which may affect in a greater or less degree, the navigation of the river, should be built; and the rule in all such cases is, in the absence of specific legislation on the part of Congress, that the matter is left entirely to the states, and so as to this river, to the state of Wisconsin. Undoubt-

edly Congress has the power to legislate as to all rivers navigable in fact, but not having done so, the court held before, and holds now, that the Government cannot interfere by information or by bill in chancery, either to abate or to prevent any obstructions to the navigation of the river.

We think, therefore, that the original ruling upon this subject was correct, and that the only thing that can change it is direct action on the part of Congress. Whenever Congress has interfered in such a way as to show clearly that the acts authorized by the state, or done by individuals, and which obstruct the navigation of the river, are hostile to such legislation, undoubtedly it is competent for the Government to interfere by a bill in chancery, or by an information to abate the nuisance, if it can be so called, or to prevent the obstruction to the navigation of the river. It was upon this principle that the court acted in the case of the Milwaukee & St. Paul railroad company as to the bridge over the Mississippi river near La Crosse. Congress had legislated in relation to bridges across that river, and had declared that they should be constructed only in a particular way, and under the direction of the Secretary of War. There was an attempt to construct the bridge across the Mississippi in disregard of the provisions of the act of Congress, and the United States filed a bill to prevent this from being done, and the court held that it had jurisdiction on the ground that there was something being done which was forbidden by an act of Congress.[1]

We do not think that the general features of this bill are changed as to the principles which are involved in the case, by the amendments which have been made. The material amendment which has been put in is, that there have been

[1] *United States vs. Milwaukee & St Paul R. R. Co.*, 5 Bissell, 410.

certain acts done under the authority of the laws of Congress, with which these obstructions or operations of the defendants may or do interfere. But it will be observed that the allegation in the bill is not of such a character as to warrant the court in assuming that at the time the original bill was filed, (from which time alone, of course, we can take our departure upon this subject) there was any such effect produced upon the improvements which were made under the acts of Congress, as to warrant the court in interfering.

I will now notice some of these acts of Congress. There have been acts passed under which surveys of the Chippewa river have been made, and appropriations have also been made, specially for the improvement of the river. So far as the survey of the river has been made, with any money so appropriated, the acts done by the defendants would not be of such a character as to warrant the court in interfering in this way with them. The disbursements have been made under the authority of the War department, and reports have been made by the engineers who have performed the work. We may refer to the last act of Congress. Although that act was passed since this bill was filed, still we think we can examine it for the purpose of ascertaining the intention of Congress in making these appropriations, and as giving tone to the whole legislation upon that subject, and to show that it was the intention of the act of Congress not to interfere with anything that had been done or was being done under the authority of the state in relation to the river. That act declares that nothing therein contained shall affect existing legal or equitable rights on the river, claimed under the laws of the United States, or of the state.

Now this being so, and there being nothing in the bill to bring it clearly within the principle of *The United States vs. Duluth*, 1 Dillon, 469, decided by Mr. Justice MILLER, we think it cannot on that ground be sustained any more

than the other; in other words, it is not shown by the amendments to the bill, that any acts which may have been done, or which are contemplated by the defendants, will interfere so much with what had been done under the authority of acts of Congress up to the time this bill was filed as to justify, or to sustain this pleading, either as an information or as a bill in chancery to abate the nuisance, if nuisances have been committed by the defendants. But we think it is shown that most, if not all, of the acts of the defendants have been done under the authority of the state. Booms have been constructed and logs have been permitted to run loose in the river as in other rivers in the state, and if it be true that there has been any violation of the acts of the Legislature, either in the construction of booms, or in the manner in which logs are permitted to run, parties who have suffered injury may have their remedy. But that is not the question here. It is whether the Government by this information or bill in chancery, can put a stop to these proceedings, or prevent these acts on the part of the defendants.

We think, in order to maintain the bill on the ground that there is an interference, or a threatened interference, that the allegation should be clear and unmistakable, and should show that such a case is made as to warrant the court in putting a stop to those acts. The question undoubtedly is of very great importance; but it is always competent for Congress to interfere. We understand that in the case of *Pound vs. Turck*, 95 United States, 495, the Supreme Court of the United States has announced the principle that it is competent for a state even to construct a dam across a navigable stream, in the absence of any special legislation of Congress upon that subject, and that case does not make any distinction between the different parts of the river, whether above or below the falls, but speaks of it as a navigable river, and

proceeds on that assumption. That being so, and there being no other legislation upon the subject of the Chippewa river, except that appropriations have been made for the purposes of survey, and the improvement of the river, and it not being clearly shown that these acts on the part of the defendants do necessarily interfere in such a way as to prevent the effect of these appropriations under the acts of Congress, we must again sustain the demurrer to the amended bill.

BUNN, J., concurring.

See *Heerman vs. Beef Slough Manufacturing, Etc., Co. Ante*, page 334. [*Reporter.*

In re ALONZO ROBERTS *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—FEBRUARY, 1879.

IN BANKRUPTCY.

FILE MARKS NOT CONCLUSIVE.—A petition in bankruptcy was marked as filed at "12 o'clock." An execution against the bankrupts' property was also marked as filed with the sheriff at "12 o'clock," the same date: *Held*, That the file-marks were not conclusive, and that it was competent to establish the priority of the execution lien by showing by parol testimony, that in fact the petition was not filed until 1 o'clock.

Petition for review from the District Court.

Messrs. *Dent & Black*, for claimants, cited *Hale's Appeal*, 44 Pennsylvania State, 438; Herman on Executions, 399; *Baker vs. Davis*, 22 New Hampshire, 27; *Owens vs. Ranstead*, 22 Illinois, 161; *Metzler vs. Kilgore*, 3 Pennsylvania,

247; *Metcalf vs. Inghams*, 2 Burrough, 960; *Michaels vs. Shaw*, 12 Wendell, 587; Bump on Bankruptcy (9th ed.) 373; *Wells vs. Brackett*, 30 Maine, 61; *Garlick vs. Sangster*, 9 Bingham, 46, and others.

Frederick Ullman, for the assignee.

DRUMMOND, J.—Alonzo Roberts, Porter D. Roberts, and Alphonso C. Day, in 1878, were engaged in business in Chicago, as copartners, and while so engaged they became indebted to Washington P. Cook for money borrowed of him from time to time, and for which notes were given, accompanied by warrants of attorney to confess judgment. There seems to be no question made of the good faith of the indebtedness of the firm to Cook, and the controversy grows out of the manner in which, and the time when, judgment was obtained and execution issued on the debt due to Cook, and on the manner and time when a petition in bankruptcy was filed by Roberts & Co. The bankrupts not having performed the promises which they made to Cook for the payment of his claims, he, on the 7th day of May, 1878, caused to be entered up in the Superior Court in Chicago, a judgment for the amount of his claim, being $6,420.24. Execution was issued immediately, and placed in the hands of the sheriff at or before 12 o'clock of that day, and so became, under the law of this state a lien upon the personal property of the bankrupts. Roberts & Co. on the 6th day of May applied to Mr. Bisbee to draw up a petition for them in bankruptcy. He drew it up at his house on the evening of that day, and about 11 o'clock went into the clerk's office of the District Court of the United States for this district and deposited with the bankrupt clerk the necessary deposit fee, and the clerk, or rather one of the members of the firm of Roberts & Co., made a memorandum of the case. Mr.

Bisbee then took the papers and went to the Register's office, and the papers were signed and sworn to by the bankrupts, but Mr. Hibbard, the Register, did not add his jurat. Mr. Bisbee being called out to attend to some case in court, did not return to the Register's office where the papers were left, until after 1 o'clock, when he went to the office of the Register, and found that the jurat had been added by Mr. Hibbard. He took the papers, handed them to the bankrupt clerk, and they were marked filed as of the date, "12 o'clock, May 7th," which was also the file-mark made by the execution clerk on the execution issued from the Superior Court. It thus appeared that the petition in bankruptcy was marked filed precisely at the same hour that the execution was marked as having come into the hands of the sheriff. There can be, I think, no doubt, however, from the evidence, that the execution was really placed in the hands of the execution clerk before 12 o'clock, and it is equally clear from the evidence, that the petition in bankruptcy was not actually filed in the clerk's office until after 1 o'clock.

The District Court held that the file-marks on the execution, and on the petition in bankruptcy, were conclusive and estopped all parties, and therefore, that the extrinsic facts could not be shown, and accordingly held that Mr. Cook had established no priority of right over the general creditors of the bankrupt. As there is no question made of the good faith of Mr. Cook, or of the manner in which he obtained his judgment and execution, the only point is whether the decision of the District Court was right in holding that these file-marks were conclusive. I think that in this respect the District Court erred, and that it was competent for the parties to show what the fact was as to the time when the petition in bankruptcy was actually filed. That is a mere direction given by the law to the clerk, and with which Mr. Cook, the creditor who claims priority here, had nothing

to do, and it would be a hard rule, if a mistake were made by the clerk as to the time of filing the petition, that he should be bound by it. I think the authorities cited by counsel are clear, that the file-mark is not absolutely conclusive either in the one case or in the other, and would not be unless expressly so made by statute.

Mr. Cook made an application to the District Court claiming a priority of payment over the other creditors of the bankrupt firm, which application was denied by that court, and in consequence of which he filed a petition in review to this court, and the order of the District Court will therefore be reversed, and that court directed to give priority to the claim of Mr. Cook.

WILSON PACKING COMPANY *et al.* vs. ROBERT HUNTER *et al.*

CIRCUIT COURT — SOUTHERN DISTRICT OF ILLINOIS — MARCH, 1879.

1. FOREIGN CORPORATION—SERVICE OF PROCESS.—A foreign corporation doing business in Illinois, is liable to be sued there in the Federal Court, though there be no express provision of statute in regard to service.

2. FEDERAL JURISDICTION.—Such a corporation is to be "found" there, within the meaning of the United States statutes, which provide that no suit shall be brought against any person in any district other than that in which he is an inhabitant, or where he is found.

Goodwin, Offield & Towle, for complainants.

Holmes, Rich & Noble, for defendants.

DRUMMOND, J.—This case is of importance, as it involves the question whether process can be served upon a foreign corporation doing business in this state, because it is found in the state.

The acts of 1789 and 1875 declare that no suit shall be brought against any person in any other district than that in which he is an inhabitant, or where he is found, so that where suit was brought against any person in a district other than that in which he resides, or in which he is an inhabitant, he must be found there, in order to enable the courts of the United States to have jurisdiction; so there has always been a rule in relation to suits brought against any persons in the Federal courts. When the Supreme Court declared that a corporation was a person within the meaning of the law, which authorized suit to be brought by and against persons, then, of course, the question arose at once where this person was to be found or was found. The case of *The Bank of Augusta vs. Earle*, 13 Peters, 517, decided the question as to where a corporation could make a contract. The question did not arise there under the clause of the law as to where a corporation was found. The court held that although a corporation could not migrate from the place where it was created, still, unless there was some law of the state which prohibited a corporation from making a contract, that is to say, where it was outside of the state by which it was created, it was a valid contract and might be enforced. In the cases which have been cited, the *Schollenberger Case*, 6 Otto, 369; the case of *Williams*, reported in the Patent Office Gazette,[1] and some other cases, they were cases where there was an express provision of the statute declaring that process might be served upon a foreign corporation

[1] *Williams vs. Empire Transportation Company*, 14 Official Gazette of Patent Office, 523.

doing business in the state or district where suit was brought. That was true of the law of Pennsylvania, the law of New Jersey, and is also true of foreign insurance companies in this state. These are obliged to answer to process upon their agent precisely the same as in the state where created. But in this case it is admitted that no express provision of law authorizes this particular corporation, created under the law of the State of Missouri, to be served within the limits of this state. But I think we may infer that, from its right to do business in this state. That foreign corporations, and their agents doing business in this state, shall be subject to all liabilities, restrictions and duties which are or may be imposed upon corporations of like character of this state, and that they shall have no other or greater power, is expressly stated in the statute.[1] This statute implies that foreign corporations may do business within this state, but when they are admitted to do business in this state, they shall be subject to this provision of the law. Now, the question is, whether foreign corporations, coming into this state and doing business in this state, are subject to this liability, namely: to be sued within the courts of this state, and so in the courts of the United States, in the district where they are doing business. It seems to me that this question was substantially decided by the case of *Harris*, reported in 12 Wallace.[2] If we admit that under the law of this state this corporation can do business in this state, and has been doing business in this district within the meaning of the acts of Congress, then it was found within this district so that process could be served upon it.

The allegation in the bill that the St. Louis Beef Canning Company—this corporation created under the laws

[1] Illinois Revised Statutes, Chapter 32, Section 26.

[2] *Railroad Company vs. Harris*, 12 Wallace, 65.

of Missouri — owns and possesses a slaughter house and stock yard in the city of East St. Louis, Illinois, where beef to be canned by the company is slaughtered and dressed, preparatory for, and in the name of, such company, is not denied in the plea, and it must be considered as admitted. Now, in the case of *Harris*, *supra*, the only ground upon which the court took jurisdiction of the case was under the acts of Congress. The Baltimore & Ohio Railroad was authorized to construct a railroad within the District of Columbia; the service of process was upon the president of the company; he was found within the district; the person—the corporation—was there through its president, and it was the only way that the court could by any possibility take jurisdiction. The person—the defendant—the corporation, must be found within the district in order that the court may take jurisdiction, and it was found there in consequence of the acts of Congress, which authorized it to construct a branch road within the district, and because the president was there within the district. At the time the writ was thus served there was no act of Congress authorizing suits against corporations doing business in the district, and of course no act which authorized service of process upon foreign corporations, though the court took jurisdiction of the case, as I have said, on the ground that the corporation was there found. It is said that if this position be maintained, that every officer of every foreign corporation who comes within the limits of the State of Illinois is liable to service of process, and that the corporation would be found here because the officer or president was here. That does not follow. On the contrary, I think that it is to be said only of foreign corporations that should be thus found here, in the absence of any express legislation authorizing service of process. It is necessary that the foreign corporation should do business in the state in order to be found

here, and in order to warrant service on the president when within the limits of the state. The mere fact of its president or other officer passing through the state, and process being served upon him, would not bring the case within the meaning of the act of Congress. A foreign corporation would not in that way be found within the limits of the state, and it seems to me that independent of the authority of the case of Harris, sound reasoning leads us to the same result. As soon as it was determined that a corporation was a *person* liable to sue and be sued, it must of necessity be brought within the jurisdiction of the Federal courts. As the law is now understood and has been decided by the Supreme Court of the United States, a foreign corporation cannot do business outside of the territory where created, except by the consent of the state where it desires to do business. Of course, that being so, the state has a right to prescribe upon what condition it may do business. As to foreign insurance companies, Illinois has legislated upon that subject because the agents are so numerous; their names are legion. The statute, therefore, declares that before a corporation of that kind can do business here, it must consent to service of process upon its agent.

There is no such legislation as to this particular kind of corporation; but does it follow that the state must legislate upon the Beef Canning Association of Missouri, or that otherwise it cannot be served with process? I do not think that because it has legislated in relation to foreign insurance companies, it must legislate upon all corporations as to service of process. When they attempt to do business within the state, they come within the limits of the state; they are protected by our laws when they transact business within our territory, and are they then not to be subject to suits against them? Ought they to be permitted to come here, to make contracts, to do, maybe, all their business

here by virtue of the law of another state, and then say they cannot be sued in our state because their corporation is within another—a sister state? I do not think that it is reasonable or right. They transact business under the protection of the laws, and they ought to be liable to the burdens as well as the benefits of the laws. One of the burdens, I think, is liability to be sued. I do not very well see how they cannot be, under the statute I have cited already, which provides that they shall be subject to all liabilities, restrictions and duties of home corporations. Undoubtedly, the state can legislate in relation to all foreign corporations, and can declare under what terms they shall do business within our state, as in relation to foreign insurance companies, and perhaps other kinds of corporations. It has not chosen to do so as to this particular class, but I do not think on that account a foreign corporation doing business within our state can escape the consequences which follow from that business, one of which is liability to be sued. Inasmuch as this plea does not meet the allegation of the bill in all respects, and especially in the view taken of this case, it must be held to be insufficient, and is overruled.

A national bank cannot be sued in the Federal court outside of the district where it is located, and service on the cashier, when found within another district, does not give jurisdiction. *Main vs. Second National Bank*, 6 Bissell, 26.

The acts of Congress confer no jurisdiction over a defendant who is served with process, while temporarily in a district in which he does not reside. *Smith vs. Tuttle*, 5 Bissell, 159.

In a suit against a corporation, in the United States Circuit Court in one state, by a citizen of another state, service of process within the state upon a joint defendant, a citizen of a third state, gives the Federal court jurisdiction over him. *Mowrey vs. Ind. & Cin. R. R. Co.*, 4 Bissell, 78.

Under the act of Congress of March 3, 1875, a corporation cannot be served with process outside of the state where it was created, and the presence of an agent of a foreign corporation is not the presence of the corporation within the meaning of the act. *Hume vs. Pittsburgh, Cincinnati & St. Louis R. R. Co.*, this Volume, page 31. [*Reporter.*

GEORGE LESLIE vs. THE TOWN OF URBANA.

CIRCUIT COURT—SOUTHERN DISTRICT OF ILLINOIS—MARCH, 1879.

1. DECISIONS OF STATE SUPREME COURT—WHEN FOLLOWED.—The Supreme Court of Illinois having decided that the Legislature cannot by subsequent legislation, render valid a vote by a town to subscribe to railroad stock, if there was no law in force at the time of the subscription authorizing it, the Federal Court will follow that authority although in conflict with a prior decision of the United States Supreme Court.

2. ESTOPPEL.—Although a town has paid interest on its bonds for ten years, it is not estopped from denying their validity even in the hands of innocent purchasers.

George W. Gere, for plaintiff.

Wm. D. Somers and *F. M. Wright*, for defendant.

DRUMMOND, J.—In this case bonds were issued by the town of Urbana to the Danville, Pekin & Bloomington Railroad Company. At the time the town voted, on the 4th of August, 1866, by a majority of voters to take the stock and issue the bonds, there was no law which authorized the vote. An act amending the charter of the railroad, on the 28th of February, 1867, attempted to give effect and validity to this vote. An act of April 17, 1869, in some particulars, further legalized the election. The case of the town of *St. Joseph vs. Rogers*, 16 Wallace, 646, was decided under these identical statutes, and the bonds issued in that case were declared valid, so that we have an express decision of the Supreme Court of the United States declaring that the statutes, under which the bonds in a case precisely similar to this were issued by the town of St. Joseph, were valid, but the

Supreme Court of Illinois has ruled in several cases that the Legislature could not constitutionally render such votes valid when there was no law in force at the time authorizing them.[1]

In the case of the town of *Elmwood vs. Marcy*, 92d United States Reports, 289, the Supreme Court of the United States seemed to consider the law settled in this state by the decisions of the Supreme Court, that the Legislature cannot render valid a vote to subscribe to the stock of a railroad when there was no law in force at the time which authorized the vote. Undoubtedly this is in direct conflict with the decision of the Supreme Court of the United States in the case of the town of *St. Joseph vs. Rogers*, in the 16th of Wallace, already referred to. The opinion of the majority of the court in the case of *Elmwood vs. Marcy*,[2] does not refer to the case in the 16th of Wallace, but the opinion of the minority does, and it is therefore clear that the attention of the court was directed to the latter case, and that it was considered no insuperable obstacle in the way of following the decisions of the Supreme Court of this state. In the case of *Alcott vs. The Supervisors*, 16 Wallace, 678, the court refused to follow a decision of the Supreme Court of Wisconsin, which ruled that a statute of that state was unconstitutional. This was also in a bond case.

This places the law in a doubtful condition and leaves it very uncertain for parties who deal in bonds to know what to depend upon. There are decisions of the Supreme Court of this state which hold that the Legislature cannot render valid a vote to subscribe to stock, unless there was a law in force at the time authorizing the subscription; on the other hand, there is a decision of the United States Supreme Court which

[1] *Marshall vs. Silliman*, 61 Illinois, 218; *Wiley vs. Silliman*, 62 Illinois, 170; *Barnes vs. Lacon*, 84 Illinois, 461.

[2] *Township of Elmwood vs. Marcy*, 2 Otto, 289.

declares that the Legislature may do so, and for aught we know, these parties, plaintiffs in this and other cases, may have bought these bonds relying on the decision of the Supreme Court of the United States, in 16 Wallace. Perhaps some criticism might be made upon the rulings of the Supreme Court of the United States, but while it may be that the court has not been always consistent in its rulings on this question, we have to judge by the best lights before us. What is its latest deliberate decision on this point? So far as I can see, it is to follow the latest decision of the Supreme Court of this state, and so the issue of the bonds in this case was unauthorized by law. While it is a very hard case on the bondholders, and not a very creditable defense on the part of the town, because they have, as the declaration alleges, for ten years paid the interest on these bonds, and only woke up at the end of that time to find them invalid, and to refuse to pay them; yet we must sustain the defense. Individuals might be estopped from refusing to pay them. I suppose a town is not, because the law is that if the act was not authorized—in other words if it was a void statute—no act of the town could ratify it. It would be otherwise if voidable or merely irregular.

It is embarrassing to meet such questions of law, and in such a way as this question arises in this case, but still we have to follow the only guides there are in the case, and grope our way as best we can, however dark may be the path, and so far as I can see, the Supreme Court of the United States informs us that it intends to follow the decisions of the Supreme Court of this state. It has, therefore, substantially overruled the case of the *Town of St. Joseph vs. Rogers, supra.*

This being a demurrer to the declaration, although it avers a ratification, payment of interest and other facts tending to the same result, still we must hold, I think, that the demurrer

is well taken, and that the bonds are invalid, even in the hands of *bona fide* holders.

Perhaps I might refer to the case of the town of *Keithsburg vs. Frick*,[1] which was cited and so much commented on by the counsel on both sides. In that case it is true that the court in its opinion states that the issue of the bonds would have been valid under the vote which was taken (ostensibly under the act of 1849, I think), and which was subsequently sought to be legalized by an act of the Legislature. The court does say that that act gave validity to the vote, although there was no law in force at the time authorizing it. But still the court also says that the bonds were issued under a law which authorized the subscription to be made and the bonds to be issued by the authorities of the town, and that it did not require a vote at all upon the subject. So that really what the court says in relation to the act of the Legislature legalizing the vote, was unnecessary to the decision of the case, and in a sense may be considered nothing more than *dictum;* and upon that view the Supreme Court of this state relies in its subsequent decisions, although the Supreme Court of the United States, in the Rogers case, refers to and relies upon the decision of the Supreme Court of this state, in the case of the *Town of Keithsburg vs. Frick.*[1]

The demurrer will be sustained. I presume the case will go to the Supreme Court, and if it goes there, the parties can see whether the view we have taken of the case of *Elmwood vs. Marcy* is correct.

On appeal to the Supreme Court, this case was affirmed by a divided court. [*Reporter.*

[1] 34 Illinois, 405.

UNITED STATES vs. JOHN McDONALD *et al.*

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—MARCH, 1879.

INDICTMENT.

1. RESISTING AN OFFICER.—Under Sec. 5398, Revised Statutes, it is as much an offense to resist an officer who is attempting to execute process, as it is to resist him when serving or attempting to serve process. Holding attached property after seizure is part of the execution of the process; and if a person resists or obstructs an officer thus holding property, he commits the statutory offense.

2. CUSTODIAN.—Resistance to a special custodian of such property, who is employed by a United States Marshal—though such custodian be not a regularly appointed sworn deputy—is resistance to the Marshal within the meaning of the statute.

3. GOOD FAITH OF OFFICER.—If an officer holding a writ of attachment against A., seizes the property of B., and in so doing acts in good faith, and on reasonable grounds for believing the ownership of the property to be in A., resistance by B. to service or execution of the process is unlawful.

4. SEIZING B.'S PROPERTY ON WRIT AGAINST A.—But if an officer with process against A. seizes the property of B., and in so doing acts in bad faith, or without reasonable grounds for believing the ownership of the property to be in A., forcible assertion of the right of possession by B., would not constitute the offense named in the statute.

5. Willful resistance and obstruction of an officer defined.

6. JOINT INDICTMENT.—Where two or more persons are jointly indicted for the commission of one and the same offense, to convict all, it must appear that the offense wholly arose from the joint act of all.

7. PROOF OF SEPARATE ACTS.—Such an indictment is not sustained by proof merely that each of the defendants separately committed at different times a separate and distinct offense of the character charged, with which the other defendants were not connected, and in which they did not participate.

G. W. Hazleton, District Attorney, for United States.

Finch & Barber, *W. W. D. Turner* and *George B. Goodwin*, for defendants.

DYER, J., charged the jury as follows:

This is an indictment which charges the defendants with the offense of obstructing and resisting an officer of the United States in the service and execution of process issued from the U. S. Circuit Court.

The allegations of the indictment in brief are, that on the 11th day of January, 1879, one Isaac Cook, a citizen of Missouri, commenced in the Circuit Court of the United States, for this district, an action against the defendant, McDonald, to recover a certain demand, in which action a summons was issued and placed in the hands of the marshal for service; that a writ of attachment commanding the marshal to attach the property of the defendant, McDonald, was also issued in the same action, out of and under the seal of the court, the plaintiff in the action having made or procured to be made the affidavit and undertaking required by law in such cases; and that the writ of attachment, affidavit and undertaking were placed in the hands of the marshal in connection with the summons for service and execution.

That on or about the 16th day of January, the marshal caused and directed two of his deputies to proceed to the premises of the defendant, McDonald, to serve the summons and execute the writ of attachment, and that they did, on or about that day, serve the summons, and attach and take into custody a certain quantity of personal property, found by them upon the premises of the defendant, McDonald, as his property by virtue of the writ of attachment; that an inventory and appraisal of the attached property were made, and that thereafter copies of the writ of attachment, affidavit,

undertaking and inventory were served upon McDonald; that at the time of such service, one of the marshal's deputies, W. A. Nowell, made an arrangement with the defendant, McDonald, to leave the attached property on his premises, in the charge and custody of one Jas. H. Hubbard, who was there present at the special request and by direction of deputy Nowell, and that such arrangement was agreed to by the defendant McDonald, and was acted upon by the deputy; and that the property was left upon the premises in the special care and custody of Hubbard.

It is then alleged that on or about the 22d day of January, Hubbard was specially authorized and directed by the marshal to keep possession of the attached property, and to protect the same, and his letter of authority and direction is set out in the indictment. It is further charged, that on the 27th day of January, the attached property being in the care and custody of the marshal in the manner alleged, the defendants did forcibly, willfully and unlawfully take and remove a large portion thereof from the possession of the marshal and of Hubbard, against and in defiance of the authority of the marshal, and so it is charged that they did knowingly and willfully obstruct, resist and oppose an officer of the United States in serving and attempting to serve and execute a *mesne* process of the United States, namely, the writ of attachment before mentioned.

This is the first count of the indictment. The second count, in more abbreviated form, charges the commission of a similar offense by the defendants on the 27th day of January, and is understood to be but a repetition of the charge contained in the first count.

The statute of the United States, upon which this indictment is based, is as follows: "Every person who, *knowingly* and *willfully*, obstructs, resists or opposes any officer of the United States in *serving* or attempting to serve or *execute* any

mesne process or warrant, or any rule or order of any court of the United States, or any other legal or judicial writ or process,"[1] shall be punished in the manner prescribed by the statute. And the question is, Have the defendants committed this offense, and so made themselves amenable to the penalties of this law?

There has been put in evidence the judgment roll in the case of *Cook vs. McDonald*, consisting of the summons, complaint, writ of attachment, affidavit, undertaking, inventory of attached property, returns of service, affidavit of no answer and judgment. The return of service on the summons, shows that it was served on the defendant, McDonald, on the 14th of January, 1879, and the return upon the writ of attachment shows that the marshal on the same day attached the personal property described in the inventory, and that on the 16th day of January, the writ of attachment, affidavit, undertaking and copy of inventory were served on McDonald as the defendant in that action.

This writ of attachment was *mesne* process within the meaning of the statute referred to, and was such process as the statute makes it an offense for any person to knowingly and willfully obstruct or resist an officer of the United States in serving or attempting to serve or execute.

The point has been made, that if any levy by attachment upon the property in question was made, it was completed prior to the 27th of January, when the alleged resistance to the officer transpired, and that if such levy was so made and the writ was returned to the clerk of the court before the 27th of January, the acts complained of, if proven, did not constitute obstruction of or resistance to the officer in the service or execution of the writ, and consequently that there can be no conviction. My view of that question is

[1] Revised Statutes, section 5,398.

this: The statute makes it an offense to knowingly and willfully obstruct, resist or oppose any officer of the United States in serving or attempting to serve, or *execute* any *mesne* process. Now, even though the attachment levy was made on the 14th day of January, and before the alleged acts of resistance, and even though the writ was returned to the clerk of the court before the 27th of January, if on that day the marshal was, through a special custodian, holding the property under a levy, so previously made, this was part of the process of executing the writ, and obstruction of or resistance to the officer at that time, if otherwise unlawful, would be as much an offense under the statute, as if such obstruction or resistance had transpired while the attachment levy was actually in progress or before the writ was returned. The offense does not consist alone of obstructing or resisting an officer in *serving* or attempting to *serve* process. It includes as well obstruction of or resistance to an officer in attempting to *execute* the writ, and holding attached property after levy and seizure is part of the execution of the process.

* * * * * * * *

It is claimed further that there was no resistance by the defendants to any *officer of the United States;* that the person resisted, one Hubbard, was not such officer, and that the alleged resistance to him, was not a resistance to the marshal or to any of his regularly appointed deputies. The prosecution has given evidence tending to show that the first proceedings upon the writ of attachment were had under the immediate direction and supervision of the marshal's deputies; that after the alleged levy by attachment had been made, Hubbard was employed by one of these deputies to assume custody and care of the property; and that on the 22d day of January, 1879, the marshal wrote and sent to Hubbard a letter directing him to hold the property.

It is not claimed that Hubbard received directly from the marshal any other authority to act than this letter, nor that he was a regularly appointed sworn deputy marshal under the statute. And as I have said, it is contended in behalf of the defendants, that resistance to him, if any be shown, was not resistance to the marshal nor to any officer of the United States. I do not concur in this view of the law. It is not and cannot be required or expected, that the marshal shall be always personally present when process is served or is in course of execution, or that he can always exercise personal and immediate control over property that may have been seized upon such process. He has the right and power to designate and appoint a custodian of such property and to hold it by the hand of such custodian, and when it has been seized and is so held, it is, in law, in the charge and custody of the marshal, and in such case, the marshal, as an officer of the United States, by the hand of such custodian so appointed, executes the writ. I therefore instruct you, that if the property in question had been previously attached by the marshal's deputies, and if subsequently Hubbard received from the marshal the letter of authority before referred to, and was on the 27th of January, 1879, acting thereunder, then any obstruction of or resistance to Hubbard as such custodian, was obstruction of and resistance to the marshal, and proof to that end is competent under the allegations of the indictment.

The defendants have given evidence tending to show that on the 9th day of December, 1878, the defendant, McDonald, executed to the defendant, Mrs. La Mothe, his two promissory notes, one for $4,961.84, and one for $5,000, and that to secure the payment of such notes he, at the same time, executed to her a mortgage upon the property in question, which mortgage contains the usual provisions to be found in chattel mortgages and was duly filed in the office of the town

clerk. Testimony has also been offered tending to show, that at some time subsequent, but prior to the service of the summons upon the defendant McDonald, in the case of Cook against him, Mrs. LaMothe took possession of all of this property under her mortgage, and that the defendant, Thompson, was her agent for the purpose of taking and maintaining such possession, and it is claimed upon the evidence that she was in actual personal possession of the property by virtue of provisions of the mortgage giving her such right, at the time of the alleged levy under the attachment. Upon such a state of facts, if proved, it is contended that the marshal and his deputies or agents had no right to take the property from her upon the writ of attachment, and that such facts, if established, constitute an absolute defense to the charge contained in this indictment. *Prima facie* the mortgage was valid and the burden of showing it to be invalid, falls upon the party attacking it; and there is no doubt, if the mortgage in question was executed in good faith to secure a *bona fide* indebtedness, and if Mrs. La Mothe by herself or her agent did in like good faith take actual possession of the property under the mortgage, so that she had the absolute and exclusive dominion and control over it as against the mortgagor, that she thereby became vested with the legal title to the property. Touching the principal question involved, there is some apparent diversity of opinion in the authorities. Courts of equal respectability seem to differ somewhat upon it, and we must therefore adopt such rule as best commends itself to our own judgment as most consonant with right and with sound legal principles. And after reflection upon the question, I have come to the conclusion that the true rule to lay down in a case of this character is this: that if the marshal and his deputies in their proceedings under the writ of attachment acted in *good faith* and on *reasonable grounds* for believing that the property in

question was the property of the defendant, McDonald, then the defendants had no right to resist the officers in serving or attempting to serve or *execute* the process. But if the mortgage in question was in good faith executed to secure a *bona fide* indebtedness, and if Mrs. La Mothe in good faith took actual possession of the property under the mortgage, so that she had the absolute and exclusive control and dominion over it, and if the marshal or his deputies acting for him, did not act in their proceedings under the writ of attachment, in good faith, or acted without reasonable grounds for believing that the property was in fact owned by the defendant, McDonald, then the forcible assertion of possession by Mrs. La Mothe and any duly authorized agent of hers acting in good faith for her, as against the officer, would not be such resistance to the officer as the statute was intended to make a punishable offense.

In considering and passing upon the alleged possession of the property in question by Mrs. La Mothe, you should determine whether such possession was taken in good faith under her mortgage, and whether it was or not an actual, exclusive possession free from any right of the mortgagor to control it. It must have been a possession taken in good faith, and so taken as to give her the absolute, exclusive and unqualified dominion and control over it, to make it such possession as under the mortgage would carry the title. And in determining this question of possession, the jury should consider all the facts and circumstances attending and surrounding the transaction, such as the situation of the property, its character, its continuance upon the premises of the mortgagor, the occupation of the premises by both the mortgagor and mortgagee as their common home, the necessity for constant care of and attention to the property, the season of the year, and the facilities for or difficulties of removing the property. In short, all of the circumstances are to be

looked into with a view of determining whether the property passed under the mortgagee's absolute and exclusive control and possession.

In considering whether the marshal and his deputies acted in good faith in their alleged attachment of the property, you will inquire whether, as the property was situated at the time, and in the light of all facts and circumstances then brought to their knowledge, the question of property right was so far doubtful that the officers acted without wantonness, recklessness or oppression and on reasonable grounds for believing the property to be that of the defendant, McDonald. It is not disputed that they knew of the mortgage, and of Mrs. La Mothe's claim to possession and ownership. Reasonable grounds for believing the property to be that of the defendant, McDonald, would be such grounds as would influence the judgment of a careful and prudent man in his own affairs, and, in considering whether the officers acted in good faith and on reasonable grounds for believing that the property belonged to McDonald, you are again to consider the nature and situation of the property, the relation of the parties thereto, any information they had as to the mortgage and Mrs. La Mothe's claim to possession, the apparent character of such alleged possession, in short, as before stated, all the facts and circumstances of the situation as they were then presented.

To constitute the offense of resisting an officer as is apparent from the language of the statute, the resistance or obstruction or opposition must be willful. The term willful as here used, means something more than intentional. It is to be here considered as implying an evil intent without justifiable excuse. An act willfully done, means that it is done wrongfully, in bad faith, with evil intent; that it is done with a bad purpose, and as an act which a person of reasonable knowledge and ability must know to be contrary to duty.

a justification for resistance to or obstruction of the officer by the defendant McDonald, if he committed any acts of resistance or obstruction.

On the other hand, if you find from the evidence that the mortgage in question was not made in good faith, or that the defendant, Mrs. La Mothe, did not in good faith take and was not at the time alleged, holding such possession of the property as I have defined, by virtue of the mortgage, and if you further find that the defendants did on the day stated, knowingly and willfully obstruct or resist, or oppose the service or the attempt to serve or execute the writ of attachment, then your verdict should be in favor of the United States.

Further, if you find from the evidence that the mortgage in question was in good faith made as claimed by the defendants, and that the defendant, Mrs. La Mothe, did in good faith take and at the time alleged hold possession of the property under the mortgage, and if you further find that the marshal and his deputies acted in good faith in their proceedings under the writ of attachment, and with reasonable grounds for believing that the property was in fact owned by the defendant, McDonald, and if you further find that the defendants did on the day stated, as charged, knowingly and willfully obstruct, or resist or oppose the service or attempt to serve or to execute the writ of attachment, then your verdict should be for the United States.

* * * * * * * *

The indictment in this case is against three defendants and charges the commission by them of the *same offense*. They are indicted together for *one offense*. To convict all of them, it is therefore essential that it be shown that the offense committed, if any offense is proven, *wholly arose from the joint act of all*. All of the defendants cannot be convicted unless each and all of them were parties to the commission of one and the same offense. An indictment in the form of this,

is not sustained by proof merely that each of the defendants has separately committed at different times a separate and distinct offense of the kind charged here, with which the other defendants were not connected and in which they did not participate, and which did not spring from the joint act of all. So, if you are satisfied from the evidence, applying to it the legal principles I have stated, that the offense charged was committed, and that it arose wholly from the joint act of all of the defendants, then your verdict may be guilty as to all, otherwise, not.

If you find that the offense charged was committed by any two of the defendants, and that it arose wholly from the joint act of such two defendants, and that the other defendant is not guilty, then your verdict may be guilty as to the two defendants, and not guilty as to the other.

So, if you should find one of the defendants guilty of the offense charged and that two of the defendants are not guilty, you may convict the one and acquit the others.

If you should find that each of the defendants did commit the offense of obstructing or resisting the officer, but that the offense so committed by each defendant was complete in and of itself, and was entirely separate and distinct from that committed by any other defendant, neither defendant in the commission of his or her offense having any connection with the offense of any other defendant, so that each complete offense was wholly independent of, and disconnected from, each other offense, then there could be no conviction of any of the defendants. So, if you should find that any two of the defendants committed the offense charged, such offense arising from the joint act of the two defendants, and if you should also find that the other defendant also committed the offense of obstructing or resisting the officer, but that the offense committed by the two defendants was wholly separate and distinct from that committed by the one defendant, the

a justification for resistance to or obstruction of the officer by the defendant McDonald, if he committed any acts of resistance or obstruction.

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is not sustained by proof merely that each of the defendants has separately committed at different times a separate and distinct offense of the kind charged here, with which the other defendants were not connected and in which they did not participate, and which did not spring from the joint act of all. So, if you are satisfied from the evidence, applying to it the legal principles I have stated, that the offense charged was committed, and that it arose wholly from the joint act of all of the defendants, then your verdict may be guilty as to all, otherwise, not.

If you find that the offense charged was committed by any two of the defendants, and that it arose wholly from the joint act of such two defendants, and that the other defendant is not guilty, then your verdict may be guilty as to the two defendants, and not guilty as to the other.

So, if you should find one of the defendants guilty of the offense charged and that two of the defendants are not guilty, you may convict the one and acquit the others.

If you should find that each of the defendants did commit the offense of obstructing or resisting the officer, but that the offense so committed by each defendant was complete in and of itself, and was entirely separate and distinct from that committed by any other defendant, neither defendant in the commission of his or her offense having any connection with the offense of any other defendant, so that each complete offense was wholly independent of, and disconnected from, each other offense, then there could be no conviction of any of the defendants. So, if you should find that any two of the defendants committed the offense charged, such offense arising from the joint act of the two defendants, and if you should also find that the other defendant also committed the offense of obstructing or resisting the officer, but that the offense committed by the two defendants was wholly separate and distinct from that committed by the one defendant, the

two defendants having no connection with the offense committed by the one defendant, and the one defendant having no connection with the offense committed jointly by the two defendants, then there could be no conviction. For as before indicated, it is the law, that when two or more persons are indicted together for an offense of this character and for one and the same offense, proof of entirely separate, distinct, unconnected offenses committed by each, will not sustain a conviction.

Verdict for defendants.

JAMES B. WILLIAMS *et al.* vs. CHARLES L. ADAMS *et al.*

CIRCUIT COURT — NORTHERN DISTRICT OF ILLINOIS — APRIL, 1879.

IN EQUITY.

1. TRADE MARK—ABANDONMENT.—Abandonment of a trade mark is not made out by showing numerous infringements in which the owners of such trade mark have not acquiesced.

2. "YANKEE."—The term "Yankee" applied as the name or label upon soap: *Held*, to be a valid trade mark.

Bill to restrain the use of a trade mark.

The alleged trade mark is the use of the word "Yankee," as a label or mark to designate the complainants' manufacture of a certain kind of shaving soap. The bill set up that the firm of Williams Brothers, in 1846, commenced at

Manchester, Connecticut, the manufacture of a superior article of shaving soap, or toilet soap, to which they gave the name "Yankee Soap," or "Yankee Shaving Soap." That shortly afterwards the business place of the firm was removed from Manchester to Glastonbury, Connecticut, and the complainants' firm, as successors of the original manufacturers, have succeeded to all the rights of the original firm of Williams Brothers; and that the defendants were putting upon the market an inferior article of shaving soap, which they labeled "Yankee Williams' Shaving Soap." The complainants claimed the exclusive right to use the word "Yankee," having adopted it at an early day as a trade mark, designating their manufactured goods.

H. B. Hurd, for complainants.

Banning & Banning, for defendants.

BLODGETT, J.—I am satisfied that the complainants' case is fairly made out. The proof shows that they did enter upon the manufacture of this class of soap, as the bill alleges, and adopted this word "Yankee" as the mark or designation of their goods, and have used it from the time of its adoption to the present.

The defendants, on the contrary, claim that the complainants have abandoned the use of this word as their trade mark; that they have allowed other manufacturers to infringe upon it by putting their soaps upon the market under the designation of "Yankee," as, for instance, "Yankee Jim," "Yankee Sam," and under other labels in which the word "Yankee" is the controlling or leading term, whereby complainants' exclusive claim of right to the use of the word "Yankee" has been infringed; and that complainants have so acquiesced in these infringements as to have abandoned their exclusive right to the use of the word "Yankee."

I do not find this position sustained by the testimony. The complainants seem to have been diligent in prosecuting all persons who infringed upon their rights within a reasonable time after they became aware of such infringement. It is true that the proof shows that quite a large number of manufacturers are putting shaving soaps upon the market under the term or description of "Yankee," such as "Yankee Sam Soap," "Yankee Jim Soap," and the "Yankee Soap," which last is precisely like the complainants', and there are various other imitations of the complainants' goods, shown in the proofs. But I do not understand the rule to be, that if a party infringes upon another's trade mark there is any fixed time in which he must bring suit in order to save his rights. Certainly, there is no such neglect on the part of the complainants proved here, as would show an intention to abandon their trade mark.

The other point, that the word "Yankee" cannot be adopted by any person as a trade mark, is presented with a good deal of vigor and ingenuity by defendants' counsel, and with a show of authority. A Mr. Browne has written a book on trade marks, which to some extent, I think, is accepted by the profession as an authority, in which he sums up his own conclusion as to the principle decided in a certain trade mark case, and says: "It clearly appears from the foregoing case, that words designating localities, places or persons, such as London Dock Gin, Yankee Soap, etc., cannot be adopted or used as a trade mark."[1]

It is sufficient to say in reference to this paragraph, that Mr. Browne is not a court; that he was simply enforcing his own individual views or conclusions from certain adjudged cases. Now, it seems to me by all the analogies, that a manufacturer, especially a manufacturer thirty years ago,

[1] Browne on Trade Marks, Sections 119-125, 597.

would have had the right to adopt the term "Yankee" as applicable to some specific kind of goods, and make it a valid trade mark.

We must remember that the term was not as generally applied then as it is now. At that time, certainly, the term "Yankee" was applied to the inhabitants of but a small portion of the United States—to a small portion of the New England States. For instance, in Western Massachusetts they would speak of the inhabitants of the eastern part of that state, and along the coast from Boston, to Portland, Maine, as "Yankees." The eastern shore people were called "Yankees" in New England. In the southern, and perhaps some of the western states, all people in the New England states were spoken of as "Yankees," and since our unfortunate national rebellion, it has been quite common at the South to speak of all persons who remained loyal to the Federal Government as "Yankees." The term has been enlarged by use, undoubtedly, very much within the last fifteen or twenty years. In 1846, the time the complainants entered upon this manufacture, the term "Yankee" was restricted, and applied solely as a nickname or epithet to the inhabitants of some parts of the New England States, but it was not a term describing a specific locality or place, or person. It is not a geographical term, nor a proper name, but a designation applied by the dwellers in one locality to the dwellers in another place. It was not the name of any *certain* locality, and it seems to me complainants had the right to adopt it as their trade mark. If it has since that time, by a more general use and definite application, come to designate any certain locality — which is not conceded — such subsequent events cannot defeat complainants' right. The complainants have made such a case as entitles them to an injunction perpetually restraining defendants from using the word "Yankee" in any label or mark upon their soaps, and

the case will be referred to the Master to take proof as to the damages which the complainants have sustained.

See, also, *Roberts vs. Sheldon*, this Volume, page 898. [*Reporter*.

THE PITTSBURG, CINCINNATI AND ST. LOUIS RAILWAY COMPANY vs. THE COLUMBUS, CHICAGO AND INDIANA CENTRAL RAILWAY COMPANY *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—APRIL, 1879.

1. POWER OF RAILROAD CORPORATIONS IN INDIANA TO EXECUTE LEASES.—There being no statute in Indiana which in terms forbids or prohibits railroad corporations of that state from executing leases of their property, a lease made by such a corporation, and which is neither in violation of any statute, nor against the public policy of the state, is valid.

2. The laws of Indiana, and the decisions in that state bearing upon this point, considered.

3. One of the defendant corporations—a corporation of the state of Indiana—leased its lines to the plaintiff—a corporation of the state of Ohio. The lease was made for the purpose of forming a connecting line of travel and traffic: *Held*, that such lease was not in contravention of the statutes or public policy of Indiana, and that the lessor corporation had power to execute it.

4. PLACE OF EXECUTION OF LEASE.—It is not essential to the validity of such a lease, (in the absence of express statutory provision,) that its original execution or subsequent ratification should have been evidenced by corporate action taken by the lessor within the limits of the state by which it is created.

5. POWER TO LEASE RAILROADS IN OHIO.—The lessee corporation was not forbidden by the laws of Ohio to take the lease in question, of the road in Indiana.

6. EVICTION—MORTGAGE—DECREE OF SALE.—An unexecuted decree,

for the sale of a portion of the demised railroad, for the purpose of satisfying a mortgage made prior to the lease, is not such an eviction of the lessee, by paramount title, as to terminate the lease.

7. So, also, the appointment of receivers for the lessor corporation, but with instructions not to disturb the possession of the lessee, is not an eviction.

8. STIPULATION IN LEASE—CLASSIFICATION OF RAILROAD INDEBTEDNESS—PERFORMANCE.—A stipulation by the lessor corporation to arrange, provide for, adjust and classify its indebtedness, was *held* to be one of substance which it must perform.

9. TIME OF PERFORMANCE.—And the lessee is not bound to wait for an indefinite or an unreasonable time for such arrangement, adjustment and classification of the lessor's indebtedness, to be effected.

10. RESCISSION OF CONTRACT—TIME GIVEN FOR PERFORMANCE.—But in such case, where the lessee has acted under the lease before such arrangement and classification has been made, the court will not decree a rescission of the contract upon the application of such lessee, until the lessor is given a reasonable time within which to comply with the stipulation; especially, where by the frame of its bill of complaint, the lessee has prayed for a rescission, unless the lessor shall specifically perform within a reasonable time to be fixed by the court.

11. In this case the court considered that eight months from the date of the order would be a reasonable time within which the lessor should carry out the agreement

12. CONSTRUCTION OF CONTRACTS.—Contracts, when their meaning is not clear, are to be construed in the light of the circumstances surrounding the parties when they were made, and the practical interpretation which they by their conduct have given to the provisions in controversy.

Bill to cancel and set aside lease of railroad.

Stanley Matthews, *Baker*, *Hord & Hendricks*, and *John Scott*, for complainant.

Evarts, *Southmayd & Choate*, *Hoadly*, *Johnson & Colston*, and *McDonald & Butler*, for defendant.

HARLAN, J.—The more important facts out of which this litigation has arisen, are as follows:

The complainant, the Pittsburg, Cincinnati and St. Louis Railway Company, an Ohio corporation, was formed in 1856

by the consolidation of the Steubenville and Indiana Railroad Company, an Ohio corporation—the Holiday's Cove Railroad Company, a West Virginia corporation—and the Pan-Handle Railway Company, a Pennsylvania corporation. At the date of the lease hereafter referred to, it operated a continuous line of railroad from Pittsburg, *via* Steubenville, to Columbus, Ohio.

The history of the organization of the defendant corporation, the Columbus, Chicago and Indiana Central Railway Company, is as follows:

The Columbus and Indianapolis Central Railway Company was formed in 1864, by articles of consolidation between the Columbus and Indianapolis Railroad Company, an Ohio corporation, and the Indiana Central Railway Company, an Indiana corporation — the consolidated company operating a line of railroad extending from Columbus to Union City, on the state line between Ohio and Indiana, with a branch from the main line, in Miami county, Ohio, to the Indiana state line, where the track of the Indiana Central Railway touches the same, through Richmond to Indianapolis.

The Columbus and Indiana Central Railway Company was formed by a consolidation of the Columbus and Indianapolis Central Railway Company and the Union and Logansport Railway Company, an Indiana corporation, whose line extended from Union City to Logansport, and the Toledo, Logansport and Burlington Railway Company, an Indiana corporation, whose line extended from Logansport to the west state line of Indiana.

The Chicago and Great Eastern Railway Company, an Indiana corporation, was consolidated in 1863 with the Galena and Illinois River Railroad Company, the consolidated company retaining the former name. The latter was subsequently consolidated with the Chicago and Cincinnati

Railroad Company, an Indiana corporation, retaining the name of the Chicago and Great Eastern Railway, and the company last named, in 1865, consolidated with the Cincinnati and Chicago Air Line Railroad Company, an Indiana corporation, whose line extended from Richmond to Logansport. The company last formed by consolidation retained the name of the Chicago and Great Eastern Railway Company, owning and operating, as an Indiana corporation, the line from Richmond through Logansport to the Illinois state line, and as a corporation in Illinois, the line from that point to Chicago.

Finally, in December, 1867, the Columbus and Indiana Central Railway Company, and the Chicago and Great Eastern Railway Company (last named), consolidated and became the Columbus, Chicago and Indiana Central Railway Company, owning and operating lines of railroad extending from Columbus to the Indiana state line, four miles east of Richmond, from Union City to the junction of the main line, from Union City to Logansport, from Logansport to the Illinois state line, from the Ohio and Indiana state line, four miles east of Richmond, through that city to Logansport, and from Richmond to Indianapolis, and from a point on the eastern line of Indiana to Chicago—the entire line being about 586½ miles in length.

It should be here stated that the Cincinnati and Chicago Air Line Railroad Company, to which reference has been made, was formed in 1860 by the associate purchasers, at judicial sale, of the railroad from Richmond to Logansport. The decree was to foreclose a mortgage given by the Cincinnati, Logansport and Chicago Railway Company, and the sale was subject to the continuing lien of a prior mortgage on 27 miles of the road, between Richmond and Newcastle, given by the Newcastle and Richmond Railroad Company, then the owner of that portion, which was the same corpora-

tion as the Cincinnati, Logansport and Chicago Railway Company, with its name changed and its line of road extended from Newcastle to Logansport. After the organization of the Cincinnati and Chicago Air Line Railroad Company a bill in equity was filed in this court by James Pullan, trustee, against the last named company, to enforce said subsisting mortgage, given by the Newcastle and Richmond Railroad Company. And on July 30, 1874, a decree was rendered, adjudging that there remained due on account of said bonds and interest the sum of $933,500.44. For that sum the road from Richmond to Newcastle was directed to be sold.

On the 20th of February, 1868, the Columbus, Chicago and Indiana Central Railway Company executed to Roosevelt and Fosdick, trustees, a mortgage upon the entire railroad property of said company, with all its franchises, equipments, property, tolls, issues, profits, lands, tenements, buildings, fixtures, machinery, goods and chattels, connected with or used in the operation of said railroad, including all the property of every kind then owned or possessed, or thereafter acquired by the mortgagor, but excepting certain property which need not be here mentioned, to secure the payment of bonds then about to be issued, to the amount of $15,000,000, payable twenty years after date, with seven per cent. interest, payable semi-annually.

The mortgage recited: That the several corporations composing the mortgagor company had, prior to its consolidation, become indebted by mortgage bonds, which were still unpaid and continued a lien on the respective parts of the road and property so consolidated and united, in the amounts following, to-wit:

The Columbus and Indiana Central Railway Company, for the sum of $3,200,000 on the road from Indianapolis to Columbus, and from Richmond Junction to Union City,

and for the sum of $2,000,000 on its road from Union City to Logansport, and for the sum of $800,000 on its road from Logansport to the Illinois state line, in all, the sum of $6,000,000; the Chicago and Great Eastern Railway Company, for the sum of $5,600,000, in several liens on different parts of its road, as follows: $298,000 on line between Richmond and Newcastle; $1,283,000 on line between Richmond and Logansport, and $1,820,000 on line between Logansport and Chicago, and $2,199,000 on the line between Richmond and Chicago, the last named sum being part of an issue of $5,600,000 made to take up previous liens, and $3,040,000 of said issue being unexchanged, and delivered at time of consolidation to the Columbus, Chicago and Indiana Central Railway Company.

The mortgage also recited: That it was issued in pursuance of the resolutions adopted on February 13, 1868, by the board of directors of the mortgagor corporation, by which it was declared among other things, that it was expedient to reduce to simple forms and classes all of the bonded debts aforesaid of the corporations of which the mortgagor corporation was constituted, and for which indebtedness that corporation was, by lien upon its property or otherwise, liable; that to that end an issue be made of consolidated mortgage bonds to the amount of $15,000,000, secured by mortgage upon the property, rights and franchises of the property of the consolidated company,—$11,500,000 of such issue to be used for the redemption and payment, dollar for dollar, of the like amount of the said first mortgage bonds of the several companies already mentioned.

On the 15th of December, 1868, the Columbus, Chicago and Indiana Central Railway Company, in compliance with resolutions of the board of directors, executed to Fowler and Thomas a mortgage for $5,000,000 upon its franchises, income, equipments and property, to secure the redemption

or exchange of certain outstanding bonds, viz.: $821,000 of 20-year mortgage bonds of the Columbus and Indianapolis Central Railway Company; $1,243,000 income bonds of the Columbus and Indiana Central Railway Company; $400,000 of the Chicago and Great Eastern Railway Company construction and equipment bonds, and other indebtedness, estimated at $2,500,000.

On the 22d of January, 1869, the Columbus, Chicago and Indiana Central Railway Company leased to the Pittsburg, Cincinnati and St. Louis Railway Company upon certain terms its entire lines of railroad, 586½ miles in length, with all its franchises and property of every kind and description, except such property as the lessor company then owned or might thereafter acquire which need not be used for any purposes incident to the management or operation or repair of the railroad, or in the business of said railway company.

The lease was for the term of ninety-nine years, renewable at the election of the lessee, for like periods forever, on the same terms, stipulations, and conditions, subject, however, to its earlier determination as in the lease provided.

The lease provided that the lessee would, at its own cost, risk, and expense, during the term, keep, preserve and maintain the demised railroad in good working condition and repair as a first-class railroad, and operate the same to the end that as large an amount of earnings and profits may be made and realized therefrom as can lawfully and reasonably be made and realized under the terms of the lease; that during the term of the lease, the lessee should have the exclusive right to manage and control the demised railroad and premises, and to regulate, determine, and collect tolls, freight, and charges, and enjoy all the corporate powers, rights, and privileges appertaining to said demised premises, as fully as the lessor company could do.

In consideration of the rights secured by the lease it was

agreed that the lessee should pay out of the annual gross earnings all taxes and assessments of every kind, imposed or assessed against the lessor of the leased property, including the business done upon the line, in the same manner and to the same extent that the lessor would have to pay, if operating its own line; that of the surplus of the annual gross earnings the lessee should be entitled to receive 70 per cent. for its own sole and exclusive use; that the remaining 30 per cent. of gross annual earnings should be applied and paid by the lessee as follows:

First—To the payment of the interest that may accrue after February 1, 1869, being at the rate of seven per cent., on all the mortgage bonds of the party of the first part, to the extent of $20,000,000, in accordance with their respective equities and priorities.

Second—To the payment of the interest upon the income bonds of the party of the first part, which may hereafter be issued to the party of the second part for the purposes of construction hereinafter mentioned, said interest to be deposited in ample time to meet the accruing coupons, at some bank, trust company, or agency, in the city of New York, as may be agreed upon from time to time by the parties of the first and second parts: *Provided, nevertheless*, That if the said 30 per cent. should not in any one year be equal to the sum required for the payment of the interest as aforesaid, then, and in that event, the party of the second part shall and will, at their own cost and expense, and without charge to the party of the first part, pay to said agency or agencies the amount required to pay said interest, as the same shall become due and payable.

Third—To the payment of whatever surplus may remain in any one year of the said balance of 30 per cent. to the treasurer of the party of the first part, annually on the 1st day of March; or if, in the opinion of the said party of the

second part, the probable annual surplus shall justify the same, that semi-annually, on the first days of September and March, in each year, for dividends upon the stock, and for such other purposes as the party of the first part may determine.

In order to provide for the payment or redemption of the $20,000,000 of 7 per cent. mortgage bonds of the lessor, the lessee agreed to establish an annual sinking fund, as required of the lessor by the terms of the mortgages, and upon the redemption and cancellation of such bonds, the lessor agreed that it would, in consideration thereof, pay or issue to the lessee, at its option, 7 per cent. bonds at par for an equal amount, to be secured by a mortgage having a first lien, unless otherwise agreed upon, or issue to the lessee shares of the capital stock of the lessor.

It was further stipulated in the lease: That the lessee should provide means for and acquire any needful right of way and real estate, erect such necessary depot buildings, shops, engine-houses, side tracks, and appurtenances, and for other permanent construction as may be reasonably required to accommodate the traffic of the demised railroad, and for actual advances so made the lessee should be entitled to receive 7 per cent. income bonds, convertible into stock, at the option of the holder, at any time—all such expenditures not to exceed $2,000,000 for the (then) next three years;

That no issue of bonds beyond the $15,000,000 of first mortgage consolidated bonds, and the $5,000,000 second mortgage consolidated bonds, and the $2,000,000 of income bonds should be made by the lessor without the consent of the boards of directors of the parties to the lease; the one-half of the $5,000,000 second mortgage bonds to be used in taking up certain income and other bonds then outstanding, not included in the $15,000,000 loan aforesaid, on the different lines composing the leased lines; the other half to be

used in paying off the debts due and to become due, of all kinds of the lessor, except the said borrowed debt of $22,000,000;

That no further issue of bonds should be made, except as provided, or stock issued beyond the sum of $13,000,000, except as the same may be increased by the conversion of bonds into capital stock of the company, in which case the bonds so converted shall be canceled, making, in the aggregate, of bonds and stock, $35,000,000;

That the lessee should pay for all supplies and equipments delivered on prior contracts, after it obtained possession of the railway, and the lessor pay for all supplies and equipments delivered before the lessee takes possession, including all pay-rolls and other floating indebtedness, so that the railroad and other property shall be made free of all debt, except first mortgage bonds to the amount of $15,000,000, second mortgage bonds to the amount of $5,000,000, and $2,000,000 of income bonds to be issued, as provided in the lease, for construction purposes;

That in case of default of interest on the bonds or sinking fund for sixty days after the same shall become due and payable, or default in carrying out any of the provisions of the lease by the lessee or the guarantor to be done or performed by them respectively, for the space of four months, the lessor might take possession of all the property leased and other permanent property added thereto, without prejudice to any right of damages which the lessor may have by reason of said default;

That upon the failure of the lessee to perform the covenants of the lease, the guarantor should perform the same on behalf of the lessee, reserving all the profits and advantages therefrom to which the lessee would be entitled; and

That the leased lines shall, at all times, be placed upon a perfect equality with any other line or lines of railway that

may connect at Pittsburg, as to the rate and facilities for joint transportation for all classes of traffic to and from all points east and west—the expressed intention of the parties being to place the leased lines, in respect to the Pennsylvania railroad and its eastern connections, upon terms equally favorable to those granted to any other line.

To the foregoing lease the Pennsylvania Railroad Company was a party. In consideration of the covenants and agreements recited, and of the benefits and advantages accruing and to accrue to it therefrom, that company guaranteed to the lessor corporation that the lessee corporation would keep and perform all the covenants and agreements of the lease, and, in default thereof, the Pennsylvania Railroad Company, upon notice to it in writing of the kind and reason of such default, would keep and perform such covenants and agreements for and on behalf of the lessee corporation—in which event, the lessor and lessee corporations agreed that the said company, at its option, should be entitled to all the profits and advantages which might or could arise or accrue therefrom to the lessee corporation.

After the execution of this lease, the Pittsburg, Cincinnati and St. Louis Railway Company took possession of the leased property. But very shortly after possession was taken, it expressed dissatisfaction with the lease, and sought a modification of its terms. There is some conflict in the evidence as to the grounds upon which the claim to such modification was based. It is, perhaps, not material to inquire now whether any just reasons existed for dissatisfaction, or whether the lessor corporation could have been required to accede to any alteration or change in the terms of the lease. It is sufficient to say that the parties to the original lease, on December 10, 1870, executed an additional agreement, dating it back to February 1, 1870.

That agreement is, perhaps, the most important document in this case, and is, therefore, given at length:

"Agreement made this first day of February, 1870, by and between the Columbus, Chicago and Indiana Central Railway Company, of the first part, the Pittsburg, Cincinnati and St. Louis Railway Company, of the second part, and the Pennsylvania Railroad Company, of the third part.

"Witnesseth: That for and in consideration of the covenants hereinafter contained, and of the benefits expected to result therefrom, the parties have agreed with each other:

"ART. I. The party of the first part agrees and undertakes to ARRANGE, PROVIDE FOR *and* SO ADJUST AND CLASSIFY *all their indebtedness now existing, that* $15,821,000 *thereof shall be represented by bonds bearing seven per cent. interest, secured by mortgage upon the estate and property of the said party of the first part, the* $821,000 *being Columbus and Indianapolis Central Railway Company second mortgage bonds; and that all other indebtedness of said party, and all payments and advances heretofore made on or for interest, construction, operating and maintaining said road, accounts and expenditures made by the second and third parties, or either, in excess of the receipts heretofore derived from the business and transportation on and over said road, shall be represented by bonds bearing seven per cent. interest, entitling the holder to vote, secured by a mortgage upon all the estate and property of said company, which bonds shall be payable after twenty years, at the pleasure of said first party, and shall be convertible into preferred capital stock, bearing seven per cent. interest, at par, at any time within fifteen years, at the option of the holders of the same, which issue of bonds shall not exceed* $10,000,000, *to be received by the said second and third parties at par, in payment of their claims and advances, so far as they are entitled and may hereafter become entitled to same.*

"ART. II. That hereafter the party of the second part covenants and agrees to pay and apply the thirty per cent., being the balance of the gross earnings of the railroad of the party of the first part, as follows:

"*First*—For the payment of the coupons, as they shall from time to time mature, upon the said bonds, representing and amounting to the aforesaid sum of $15,821,000, But if the same shall not be adequate to such payment in full in any one year, then the said party of the second part will pay any such deficiency out of its own proper moneys, without charge, reclamation, or subrogation therefor.

"*Second*—Out of any surplus of said thirty per cent. remaining after payment of said interest, to pay the same *pro rata*, as interest or dividends, to and among the holders of the convertible bonds provided for in the first article of this agreement, based on the entire amount of the income bonds convertible into preferred stock, as provided for in the first article of this agreement, actually issued, and the bonds which the holders

have the option to convert into the said income bonds, and the holders of any stock into which any of said bonds may have been converted by the holder, in the exercise of the option so to do, provided for in the bonds, and also of any bonds hereafter to be issued under the provisions of a subsequent article of this agreement, to represent new constructions and additional equipment for the use of the railroad of the party of the first part; and

"*Third*—To pay to a sinking fund to be established for the redemption of said mortgage bonds, the one-half of one per cent., provided for in the mortgage to secure the payment of said $15,821,000 of bonds, for the use and benefit of the first party; and after such payment, any surplus of said thirty per cent. remaining to be divided *pro rata* as a dividend upon the common stock of the said party of the first part.

"ART. III. All sums expended by the party of the second part after the date of the agreement of January 22, 1869, and the interest thereon at seven per cent., upon the cost of any new equipment provided by the party of the second part, necessary for the successful operation of the road of the party of the first part, shall be promptly liquidated and paid to the second party in said convertible bonds at par.

"ART. IV. Any defects of power or authority (if such there be) to enter into and effectuate the agreement of January 22, 1869, and of this present agreement existing between the parties hereto shall be removed, and the requisite authority therefor be obtained at the earliest practicable time; and thereupon either party may require of the other the due execution of such instruments as will perfect, confirm and render operative and binding said agreement.

"ART. V. Whenever this agreement shall conflict with the provisions of the agreement of January 22, 1869, by and between the parties hereto, the said agreement of January 22, 1869, shall, in those particulars and to that extent, be deemed and taken to be changed and modified, and the party of the third part unites in the execution of this agreement in testimony of its assent to such modification.

"It is understood that annual gross earnings, mentioned in the sixth article of the original lease, shall be held to mean the annual gross revenues of the road of the party of the first part, after the deduction therefrom of all *pro rata* bridge tolls, drawbacks allowed on freight traffic, terminal expenses allowed to other railroad corporations on through business between the east and west, and whatever amount is paid to the Chicago and Northwestern Railroad Company per passenger and per hundred on freight for the use of their road, until the road of the party of the first part is completed to its proper terminus in Chicago.

"It is understood and agreed between the parties hereto that the thirteenth article of the original lease shall be amended and modified so as to read as follows, viz.:

"Passenger trains shall be so run as to develop and increase the local and through business upon said road of the party of the first part, and where connections are made between Chicago and the east, *via* Pittsburg, the speed thereof shall be *pro rated* upon the needs of all parties hereto, and the party of the third part shall not run trains at higher rates of speed for any other connecting line, nor grant facilities of any kind that shall not be equalled by those given to the parties of the first and second parts; and in case the organization of the party of the second part, for the procurement of either passengers or freight in the eastern cities or in the west shall not be satisfactory to the party of the first part, then the said party of the first part may use its own organization, at its own expense, for the procurement of above traffic in the east or west, being governed in the securing of such traffic by the rates fixed or agreed to by the party of the second part; and no consolidation of earnings or running arrangements shall be made by the party of the second part with any other company, for competing business or traffic, without the consent of the party of the first part."

On the 28th of April, 1870, the board of directors of the Columbus, Chicago and Indiana Central Railway Company, by resolution, directed the issue of bonds to an amount not exceeding $10,000,000, convertible at any time within fifteen years from date into preferred capital stock at par, bearing a dividend of seven per cent. interest, out of an interest fund to be provided, and prior to the payment of any dividend on the common stock of the company. The interest fund, and the amount thereof which could be applied to the payment of the seven per cent. interest on the said convertible bonds, and the seven per cent. on the preferred stock created by the conversion of said bonds into such stock, was to be ascertained annually, as follows: From the gross and entire revenue and income of the railroad and its appurtenances owned by the company, there shall each year, commencing February 1, 1870, be deducted payments on certain designated accounts. Thirty per cent. of the remaining balance was to be applied as follows: *First*, To pay the interest on $15,000,000 of bonds, being the interest on bonds of the Columbus, Chicago and Indiana Central Railway Company,

and on the bonds which they are to represent and be exchanged for, as provided in the mortgage deed of said company, dated February 20, 1868. To pay, also, the interest on $821,000 of outstanding second mortgage bonds of the Columbus and Indianapolis Central Railway Company, dated November 1, 1864. *Second*, To pay the salaries and other expenses incident to the corporate organization, not exceeding, however, $20,000. *Third*, To pay out of said thirty per cent. so much thereof as may be net earnings, and required by the provisions of said mortgages to be so applied to the sinking fund. *Fourth*, The balance and residue of said thirty per cent. to be deemed and taken to be the interest fund for the payment of the interest on the then outstanding convertible bonds and on the preferred stock created by the conversion of said bonds into preferred stock.

The resolutions of the board further provided: That so much of said interest fund as, in the opinion of the company, might be necessary for that purpose may, from time to time, be used in adjusting the (then) present outstanding bonds of the company, and the companies merged in that company by consolidation, so as to make the bonded debt of the company conform to the agreement by which said bonded debt is to be reduced to $15,821,000.

That said convertible bonds should be negotiated under the direction of the board of directors, to take up, retire, and cancel so much of all the bond indebtedness then existing, whether made by it or by any company merged in that company by consolidation, "as that the said bond indebtedness shall be reduced to $15,821,000, leaving outstanding the present existing bonded debt the $15,000,000 first mortgage bonds of this company, and $821,000 of the second mortgage bonds of the Columbus and Indianapolis Central Company;" also, to fund and pay all other existing indebtedness of the company, and also to issue so many of said convertible bonds

as may be further required by, and in performance of, the terms of an agreement between the company, and the Pittsburg, Cincinnati and St. Louis Railway Company, and the Pennsylvania Railroad Company, dated February 1, 1870.

In accordance with those resolutions a mortgage was executed upon the property of the railroad, containing the foregoing stipulations, to Parkhurst and Thompson, trustees, to secure the payment of $10,000,000 of convertible bonds.

About the date of the actual execution of the amended lease, (December, 1870,) the following letter, signed by the presidents respectively of the Pennsylvania Railroad Company and the Pittsburg, Cincinnati and St. Louis Railway Company, was prepared and delivered to the persons to whom it was addressed:

"To Messrs. W. R. Fosdick and James A. Roosevelt, trustees, and A. Parkhurst, trustee:

"GENTLEMEN: Under the contract and lease of the Columbus, Chicago and Indiana Central Railway, dated January 22, 1869, as amended by the contract of February 1, 1870, the Pittsburg, Cincinnati and St. Louis Railway Company, as lessee, which lease the Pennsylvania Railroad Company has guaranteed, will, by the terms of said lease, pay the interest as it matures on the $15,000,000 of the first mortgage consolidated bonds of the Columbus, Chicago and Indiana Central Railway Company, or on the bonds which they represent, and on $821,000 of the second mortgage bonds of the Columbus and Indianapolis Central Railway Company, which bonds are secured by deed of trust, made respectively to you.

"You are, therefore, authorized to inform the holders of said bonds, and to give such further public notice as you may think proper, that the interest on the said $15,821,000 of bonds will be regularly paid by the Pittsburg, Cincinnati and St. Louis Railway Company or the Pennsylvania Railroad Company, according to the tenor of said amended contract and lease."

On 27th of October, 1874, a written notice was given by the Pittsburg, Cincinnati and St. Louis Railway Company to the Columbus, Chicago and Indiana Central Railway

Company, which, after reciting the execution of the original and amended lease and the mortgages aforesaid, proceeded:

"*And whereas*, Four years and nine months have elapsed since the date of said supplemental agreement, yet the Columbus, Chicago and Indiana Central Railway Company has not complied with the covenants in said agreement, and by reason thereof suits have been instituted against them by holders of certain of their obligations prior in date to the date of the original agreement, namely, the 22d day of January, 1869; and a decree having been rendered by the Circuit Court of the United States for the District of Indiana for the sale of a part of the demised premises, twenty-seven miles of road, lying between Richmond and Newcastle, for an unpaid debt of $932,500.44, whereby the Pittsburg, Cincinnati and St. Louis Railway Company, as lessees, are in imminent risk of being ousted from the possession of said property and having legal proceedings instituted against them for an accounting of rents, issues, and profits derived by their operation and management of the line of railway of the Columbus, Chicago and Indiana Central Railway Company, or portions thereof.

"*And whereas*, The duties of the Pittsburg, Cincinnati and St. Louis Railway Company, while they remain in possession of said property derived from the Columbus, Chicago and Indiana Central Railway Company, as well as their obligations to the public as common carriers over the line of said road, to provide safe roadway and equipment, and proper facilities for the transaction of public business, have heretofore required, and will continue to require, large expenditures of money by the Pittsburg, Cincinnati and St. Louis Railway Company, all of which said money, already amounting to more than three million of dollars is jeopardized and endangered by reason of the default of the Columbus, Chicago and Indiana Central Railway Company in not complying with the terms of their said agreement.

"*Now, therefore*, You are hereby notified that unless your company, namely, the Columbus, Chicago and Indiana Central Railway Company, shall, on or before the 1st day of January, 1875, carry out and fulfill in good faith your said covenant and agreement, as set forth in said amended lease, dated 1st day of February, 1870, this company, namely, the Pittsburg, Cincinnati and St. Louis Railway Company, will institute proceedings *to compel the specific performance of the agreement* dated the 22d day of January, 1869, and the agreement supplemental thereto, dated the 1st day of February, 1870, and, in the alternative, such relief as they may be entitled to in equity."

On the 28th of January, 1875, the Pittsburg, Cincinnati and St. Louis Railway Company gave the Columbus, Chicago

and Indiana Central Railway Company another notice, which, after reciting the notice of October 27, 1874, declares:

"The 1st of January, 1875, having expired without your company having carried out and fulfilled your covenant and agreement, as referred to in said notice, the Pittsburg, Cincinnati and St. Louis R. W. Co. hereby notify you that they have, through their counsel, commenced the preparation of a bill in equity *to compel the specific performance of the existing leases*, and, in the alternative, such relief as they may be entitled to in equity, which bill it is their intention to file in a court of competent jurisdiction without delay; and that, under these circumstances, the Pittsburg, Cincinnati and St. Louis Railway Company are advised that it is their duty to decline and refuse to make any payments under said lease or amended lease, or otherwise, except under and according to such orders or decrees as a court of competent jurisdiction may finally make in these premises, defining the legal and equitable rights and liabilities of the parties. But pending the submission of said bill to said court for its decree and orders we will make an advance to your company, if desired by you, but under protest, of $24,836, to meet certain of your coupons maturing Feb. 1, prox., as per your notice.

"This advance will only be made under protest, and with the distinct understanding and notice that it shall not affect, in any manner, the said notice of October 27, 1874, which we gave you, or our rights in any form as lessees of your property.

"Our company will hold itself ready at all times to account to any court of competent jurisdiction that may have the case in charge, for all net earnings that may have been received from your property since 1st of January, 1875."

On 2d of February, 1875, Roosevelt and Fosdick filed their bill in the Circuit Court for the Northern District of Illinois, the District of Indiana, and the Southern District of Ohio, against the Columbus, Chicago and Indiana Central Railway Company. The object of the bill was to foreclose the first consolidated mortgage. It alleged the failure of the defendant to comply with its agreement, contained in the mortgage, to create a sinking fund for the redemption of the bonds issued under the mortgage; that the company had failed to pay the interest due upon bonds secured by prior mortgages upon certain portions of the road, or the interest

on the second consolidated mortgage bonds due August 1, 1874; that in view of its large floating debt, and its insolvency, its net earnings were liable to be diverted and misapplied, unless a receiver of its earnings and income was appointed, and such earnings and income properly applied through him. The bill sets out the original and amended lease and says: "The said lease is one beneficial to the lessors and their creditors, or parties claiming under them, and that the interest of the mortgage bondholders secured by the mortgage * * * does not require that for the present, at all events, the possession of the said lessees should be disturbed, provided they comply with the terms and conditions of such lease and contract; but that the rights and interests of your orators, and of the bondholders secured by the said mortgage to them, will be for the present sufficiently secured and protected by the appointment of a receiver of the said mortgaged premises, and the incomes and earnings thereof, with the directions to the said receiver, until further ordered by the court, not to disturb the possession of the said lessees under their lease, but to collect and receive the rental payable by said lessees or their guarantors, under and pursuant to the provisions of said lease, and apply the same in such a manner as shall be provided by the order of this court, and as shall be agreeable to equity."

The appearance of the company was entered on the same day the bill was filed and an order immediately made appointing Roosevelt and Fosdick receivers of the railroad and other property covered by the mortgage to the complainants, and of the earnings and income, rents and profits thereof, *with directions not to disturb the lessee corporation in the possession of the property*, but to collect and receive the rental stipulated in the lease and amended lease, and apply the same in such manner as shall be provided by the further order of the court. The defendant company was further ordered to

transfer and convey to said receivers the railroad and other mortgaged premises, and the income, rents, issues, and profits thereof.

In the suit just referred to, Roosevelt and Fosdick filed a supplemental bill alleging additional defaults in the payment of interest due on the first consolidated mortgage bonds, which said trustees were without funds to pay, all the funds received by them having been inadequate to pay the interest due upon the outstanding sectional mortgage bonds prior in lien to the first consolidated mortgage. It was further alleged in the supplemental bill that any sale of the mortgaged property under a decree of foreclosure, should be made without abrogating the lease and guaranty, but subject to the lease and guaranty in such manner that the purchaser should succeed to and be vested with the right to receive and collect the stipulated rent.

By an order entered June 1, 1875, Roosevelt and Fosdick, as trustees or receivers, were authorized, by judicial proceedings in any court of competent jurisdiction, to enforce the provisions of the lease and amended lease against the Pittsburg, Cincinnati and St. Louis Railway Company, and the Pennsylvania Railroad Company, or either of them. Such a suit was instituted in the Supreme Court of New York against the Pennsylvania Railroad Company, and removed to the circuit court of the United States.

On the 25th of February, 1875, the Pittsburg, Cincinnati and St. Louis Railway Company commenced suit in this court against the Columbus, Chicago and Indiana Central Railway Company and Roosevelt and Fosdick, making the Pennsylvania Railroad Company and Pullan also defendants. The bill set out at length the history of the lease and the amended lease, and also the notices already referred to.

The relief sought is shown in the prayer that the court—

"Will order, adjudge, and decree that said defendant, the

Columbus, Chicago and Indiana Central Railway Company, is in default for failing to perform its said agreement to classify and fund said indebtedness, and, by reason thereof, that said lease and the relation of lessor and lessee thereby intended to be created and continued between said parties has been ended, and that said lease and amended lease be rescinded, set aside, and delivered up to be canceled, and that the plaintiff recover of the said defendant such sums of money as shall, in an account duly taken, appear to be justly due by reason of their mutual dealings under said lease, and that the said defendant resume possession of said railroad and all other demised property, free and discharged of said lease, *unless the defendant shall, within some reasonable time to be fixed by the court, specifically perform its said covenant aforesaid, and arrange, adjust, classify, and fund its said indebtedness, as by the terms of said agreement of February 1, 1870, it is bound to do.* And in the meantime, pending this suit, the complainant prays, inasmuch as from the nature and situation of said described property and its public character as a highway for trade and travel, it would be improper for the complainant, notwithstanding its strict legal right so to do, to abandon immediately its possession and refuse to continue its occupation of said railroad and other property, your honorable court to appoint a receiver to take possession of the same and operate it, under the orders of the court, until final decree, the complainant hereby offering, until such appointment, to hold and operate the same, accounting to the court for the receipts arising from the same, paying the net profits thereof from time to time into the registry of the court as it may order, for the benefit of any and all parties showing themselves entitled thereto; and for such other and further relief as to the court may seem equitable and just."

After the institution of this action, an order was entered requiring the Pittsburg, Cincinnati and St. Louis Railway

Company to pay into court, from time to time, the net earnings of the road, to be applied, by direction of the court, to payment of interest upon bonds secured by mortgages upon parts of the consolidated road, prior to the consolidated mortgage, but without prejudice to the claims of any of the parties. Thereupon the order under the authority of which Roosevelt and Fosdick brought the suit in New York was suspended, and all proceedings thereunder stayed.

Roosevelt and Fosdick then filed their cross-bill in this cause against the Pittsburg, Cincinnati and St. Louis Railway Company, the Pennsylvania Railroad Company, the Columbus, Chicago and Indiana Central Railway Company to enforce the lease and amended lease, and to recover the rental due thereunder. To this cross-bill the two companies first-named filed an answer. To the original bill answers were filed by the Columbus, Chicago and Indiana Central Railway Company, Roosevelt and Pullan. The latter also filed a cross-bill, seeking the enforcement of his decree against the Columbus, Chicago and Indiana Central Railway Company, and to compel the Pittsburg, Cincinnati and St. Louis Railway Company to pay to him the proportion of the earnings due to him. To the cross-bill of Pullan the Columbus, Chicago and Indiana Central Railway Company demurred.

The foregoing statement does not, perhaps, recite all the facts to which counsel in their oral and printed arguments have adverted, but it is sufficient to present all the substantial issues made by the pleadings.

It will not be expected, I am sure, that I shall review the numerous authorities cited, or discuss with any elaboration the difficult and important propositions of law which arise in the case. The onerous character of my duties during the present term of the Supreme Court have rendered it impossible for me to pursue that course. While I have examined,

with care, the adjudged cases and the elementary works to which counsel have referred, and while, under some circumstances, I should be glad to prepare an extended opinion, I can do nothing more, at this time, than indicate briefly and in very general terms the conclusions which I have reached upon the vital points in dispute.

The right to the relief asked in the bill is placed by complainant upon numerous grounds.

First—It is claimed by the Pittsburg, Cincinnati and St. Louis Railway Company that the lease in question was void *ab initio*.

In support of this general proposition it is argued—

That the Columbus, Chicago and Indiana Central Railway Company, under the laws of Indiana, had no authority to make such a lease of its railroad in Indiana;

That if such authority existed, it has not been pursued, there having been no corporate power exerted, in Indiana, nor according to its laws;

That under the laws of Ohio the Pittsburg, Cincinnati and St. Louis Railway Company was not authorized to take a lease of a railroad in Indiana; and,

That the parties are not estopped from asserting the invalidity of the lease.

Upon examining the laws of Indiana in force when the lease and amended lease were executed, I find—

1. There is no statute of Indiana which in terms forbids or prohibits railroad corporations of that state from executing leases of their property.

2. By an act, approved February 23, 1853, it is provided that any railroad company theretofore organized under the general or special laws of that state, shall have the power "to intersect, join, and unite their railroad with any other railroad constructed, or in progress of construction, in this [that] state, or in any adjoining state, at such point on the

state line, or at any other point, as may be mutually agreed upon by said companies, and such railroad companies are authorized to merge and consolidate the stock of the respective companies, making one joint-stock company of the two railroads thus connected, upon such terms as may be by them mutually agreed upon, in accordance with the laws of the adjoining state with whose road or roads connections are thus formed: Provided their charters authorize said railroads to go to the state line, or to such point of intersection."[1]

3. By the same act an Indiana railroad corporation, organized for the purpose of constructing a railroad from any point within that state to the boundary line thereof, is empowered to extend its road into or through any other state or states under such regulations as may be prescribed by the laws of such state or states into or through which said road may be extended.

4. By the same act any Indiana railroad corporation which may have constructed, or commenced the construction of its road so as to meet and connect with any other road in an adjoining state at the boundary line of that state, is empowered "to make such contracts and agreements with any such road constructed in an adjoining state, for transportation of freight and passengers, *or for the use of its said road*, as to the board of directors may seem proper."

5. By the act approved March 4, 1863, providing compensation to the owners of animals killed or injured by the cars, locomotives, or other carriages of the railroad companies in that state, the same remedy is given against *lessees* as against others.[2]

6. By an act passed December 18, 1865, to secure a just valuation and taxation of all railroad property of "railroad

[1] 1 Gavin & Hord's Indiana Statutes, 526.

[2] 3 Indiana Statutes, 413. See, also, 35 Indiana, 291.

companies having the whole or any portion of their lines within this (that) state," it is provided that "in case any railroad or part thereof shall have been, or shall hereafter be *leased*, conveyed, or mortgaged to any other railroad company, and shall be in the possession of such other company under such *lease*, conveyance, or mortgage, the road or part thereof *so leased*, conveyed or mortgaged, shall, during the continuance of such possession, be assessed for taxation as the property of the company having such possession, in the same manner as if it were a part of the road of such *lessee*, grantee, or mortgagee under its own charter; and such *lessee*, grantee, or mortgagee shall, during the continuance of such possession, have all the rights and be subject to all the duties and liabilities in relation to the road, or parts thereof so held, which are created by this act, and both its property and the road or parts thereof so held, shall be liable for the payment of such taxes in the same manner as railroad property is, in other cases, made liable for taxes properly assessed against the same."[1]

7. By an act passed April 29, 1869, for the organization of companies to construct lateral roads, it is provided that in cases of sale or assignment "the purchasers, assignees, or *lessees* thereof shall file the same in such recorder's office."[2]

8. The question of power to lease seems not to have been conclusively determined by any decision in the Supreme Court of Indiana. In the case of *The Commissioners of Tippecanoe County vs. Lafayette, Muncie and Bloomington Railroad Company*, 50 Indiana, 85, it appears that a stockholder, in a direct suit for that purpose, assailed the right of an Indiana railroad corporation to transfer, or provide for the *sale* of, to an Illinois railroad corporation, a part or division of

[1] 3 Indiana Statutes, 418–21.
[2] 3 Indiana Statutes, 406.

its road. The authority for such transfer was based upon the act of February 23, 1853, already cited. The court said: (page 110) "Even if this section could be held to authorize the transfer of the use of one road to another, the words cannot fairly mean the transfer of one division of a road *to the injury of another division of the same road, thus putting the two divisions in direct antagonism, both in their interests and connection.*" But further along in the opinion the court says: (page 115) "*We do not decide that railroad companies cannot become lessors or lessees of other railroad companies*, or make other contracts with other railroad companies for the purpose of running their lines in conjunction, facilitating commerce, travel, and transportation, or for any of the legitimate purposes for which railroad companies are organized. *There is much in the legislation of the state favoring this view*, and many decisions of this court sustaining the advancing enterprise of the country, but all such contracts must come within the powers of the corporation, must not exceed the powers of the agency that makes them, must not violate the rights of stockholders, or contravene public policy." That the precise question here presented was not intended to be decided by the Supreme Court of Indiana is entirely clear from the following language in the opinion delivered in that case in response to a petition for a re-hearing: (page 119) "The appellees seem to think that we ought to have decided the general question, whether railroad companies can lease their roads under the laws of this state. * * * When such a question is properly raised before us upon a lease made for the legitimate purposes of commerce and travel, and in accordance with the proper use of railroads, it will be our duty to decide whether such a lease is authorized and can. be upheld by the laws of this state." It is evident that the decision in 50 Indiana is an authority only for the proposition that an Indiana railroad

corporation cannot legally transfer to another corporation one division of its road, so as to bring it in direct antagonism with the other divisions of the same road. Nothing more was decided. We are, therefore, uninformed by any decision of the Supreme Court of Indiana upon the precise question under consideration.

My own conclusion is—

That the lease made by the Columbus, Chicago and Indiana Central Railway Company to the Pittsburg, Cincinnati and St. Louis Railway Company was neither in violation of the statutes, nor against the public policy of Indiana. The road of the lessor company met and connected at the boundary line of the state with another railroad which was constructed under the authority of an adjoining state. That company was given, by express words, the broad power of contracting for the use of its said road, with any company whose road was thus constructed in an adjoining state. The lessor and lessee companies are connecting roads, within any fair meaning of the act of February 23, 1853. We have seen that, by the same statute, the Columbus, Chicago and Indiana Central Railway Company was authorized to unite its road with the road of an adjoining state on the state line, *or at any other point agreed upon*, and the two companies whose roads were thus united, could merge and consolidate their stocks and make one joint-stock company, in accordance with the laws of the adjoining state. Under the same statute, it could have extended its line into and through an adjoining state, under such regulations as that state might prescribe. In its capacity as lessee of the Columbus, Chicago and Indiana Central Railway Company, the Pittsburg, Cincinnati and St. Louis Railway Company is unquestionably liable, in the state of Indiana, to the taxation which is imposed in that state upon railroad property in the possession of lessees. As such lessee corporation it may be held liable

in that state and by virtue of its statutes, for damages arising from the killing or injury of stock through the negligence of its employés.

In view of the powers thus conferred, and the liabilities thus imposed, by statute, upon railroad corporations created under the laws of Indiana, and in the absence of any direct adjudication upon the subject by the highest court of that state, I am unwilling to hold that the lease in question is in contravention either of its statutes or its public policy. I should be very slow to reach such a conclusion since the parties stipulated that any defects of power or authority (if such there be) to enter into and effectuate the agreement of January 22, 1869, or that of February 1, 1870, should be removed, and the requisite authority therefor be obtained at the earliest practicable time. Had the conclusion been reached that there was a want of statutory authority or power in the lessor corporation to make the lease in question, I should have felt obliged, both by the letter and spirit of the agreement between the parties, before decreeing rescission upon that ground, to give reasonable time for an application for relief to the legislative department of Indiana.

Second—I cannot yield my assent to the next proposition of the lessee company, that it was essential to the validity of the lease that its original execution or subsequent ratification should have been evidenced by corporate action taken by the lessor corporation within the limits of the state of Indiana. The general rule undoubtedly is, that corporate action taken, or corporate acts performed, by the body of the corporation, beyond the bounds of the sovereignty granting the charter, may, generally, be treated as null and void. But that rule, in the very nature of the case, cannot apply to the case of a consolidated company, whose road extends through three states, and where there is no express statutory prohibition against the corporate body taking corporate action in

any one of the states through which the road of the consolidated company extends. The state of Indiana could, by statute, require corporations, whether originally created or consolidated under its laws, to take no corporate action beyond its limits. But it is sufficient to say that the state has passed no such statute.

Third—The objection that the Pittsburg, Cincinnati & St. Louis Railway Company were not authorized by the laws of Ohio to take the lease in controversy, depends upon the construction to be given to the 24th section of a statute of that state approved May 1, 1852, entitled "An act to provide for the creation and regulation of incorporated companies in the State of Ohio,"[1] as amended by an act passed March 19, 1869.[2] The effect of the amendment can be best understood by putting that section as it appeared in the original act in juxtaposition with the amendment of 1869:

Act of 1852.	*Amendment of* 1869.
"Any railroad company heretofore or hereafter incorporated may at any time, by means of subscription to the capital of any other company or otherwise, aid such company in the construction of its railroad for the purpose of forming a connection of said last-mentioned road with the road owned by the company furnishing such aid; or any railroad company, organized in pursuance of law, may lease or purchase any part or all of any railroad constructed by any other company, if said companies' lines of said road are continuous or con-	"Any railroad company heretofore or hereafter incorporated may at any time, by means of subscription to the capital of any other company or otherwise, aid such company in the construction of its railroad, *within or without the state*, for the purpose of forming a connection of said last-mentioned road with the road owned by the company furnishing said aid; *or* any railroad company organized in pursuance of law, may *lease* or purchase any part or all of any railroad, *the whole or part of which is in this state, and* constructed, *owned*

[1] Laws of Ohio, 1852, Vol. I., 281.
[2] Laws of Ohio, 1869, page, 32.

nected as aforesaid, upon such terms and conditions as may be agreed on between said companies respectively; or any two or more railroad companies, whose lines are so connected, may enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created," etc.

or leased by any other company, if said companies' lines of said road are continuous, or connected *at a point either within or without this state*, upon such terms and conditions as may be agreed on between said companies respectively; or any two or more railroad companies, whose lines are so connected, may enter into any arrangement for their common benefit, consistent with and calculated to promote the objects for which they were created," etc.

I perceive no difficulty in ascertaining the intention of the act of 1869. According to its express provisions a railroad company organized under the laws of Ohio may lease or purchase any railroad which is in whole or in part in that state, and owned or leased by any other company, if said companies' lines of road are continuous or connected at a point either within or without Ohio. The power thus given to Ohio railroad corporations was exerted in this case by the Pittsburg, Cincinnati & St. Louis Railway Company when it took the lease in question. I cannot assent to the proposition that the power to lease thus conferred was intended to apply only to railroads, or such parts thereof, as are situate in Ohio. The act, among other things, was plainly intended to give Ohio railroad corporations power to take leases of railway lines within or without Ohio where the road of the lessee was connected at a point either within or without the state with the lines of the lessor company, thus establishing direct connections between railroads constructed in Ohio, under the authority of its laws, with lines of road constructed in other states. The manifest object of the statute was to attract business from other states over the lines of the Ohio railroads.

My conclusion, therefore, is that the lessee corporation

was not forbidden by the laws of Ohio to take the lease in question.

Fourth—The next proposition to be considered is whether, if originally valid, the lease has been terminated by the eviction of the lessee by paramount title. In support of this proposition the complainant refers: 1st, to the decree of July 30, 1874, in the Pullan case, whereby the road, in Indiana, from Richmond to Newcastle, twenty-seven miles in length, and part of the lines leased to the Pittsburg, Cincinnati & St. Louis Railway Company was ordered to be sold to satisfy the claim of the Pullan trustee. 2d. To the proceedings in the suit instituted by Roosevelt and Fosdick, trustees in the first consolidated mortgage, under which they were appointed receivers, with power to receive rents and profits due from the lessee corporation.

I am of opinion that neither the Pullan decree nor the proceedings in the suit of Roosevelt and Fosdick against the Columbus, Chicago and Indiana Central Railway Company furnish just grounds for the absolute rescission at this time of the contracts of leasing.

The eviction complained of is not an actual but a constructive eviction. Pullan, it is said, has the power at any moment to turn complainant out of a portion of the demised premises, and the existence of this power is permitted by the lessor corporation. But that in every essential sense was the case when the lease was executed. The mortgage under which Pullan claimed was then a mere incumbrance. And that is all that may be said of the unexecuted decree entered in a suit to which neither the Pittsburg, Cincinnati and St. Louis Railway Company nor the Columbus, Chicago and Indiana Central Railway Company were parties. He may never execute that decree, and so long as he does not disturb the possession of the lessee corporation or imperil its permanent control of the demised property, according to the terms

of the lease, his decree should not, according to the weight of authority, especially in Indiana, be regarded an eviction by paramount title, entitling the lessee to withhold rental or to rescission.

The same general remarks are applicable to the proceedings in the suit of Roosevelt and Fosdick. They are receivers of the income, rents, issues, and profits which are due and owing by the lessee corporation under and pursuant to the provision of the lease. They have not yet disturbed the possession of the lessee, and at present they are under instructions not to do so. They are asserting, for the bondholders, and as to the income and profits of the leased property, only such rights as the Columbus, Chicago and Indiana Central Railway Company claims to have under the original and amended lease. The possibility, during the term of the lease and pending proceedings for the consummation of the agreements between the parties, of such suits as those instituted by Pullan, Roosevelt and Fosdick must have been in the minds of the parties when the lease and amended lease were executed. Nothing which has occurred in those suits, up to the present time, would justify rescission.

Fifth—On behalf of complainant it is further claimed—

That the covenant to reduce and classify the mortgage indebtedness of the lessor company and the covenant of the lessee to pay and apply the stipulated rent are dependent, the former being a condition precedent, the performance of which must be alleged and shown before any liability can be enforced against the lessee, and the continued failure to perform which gives to the latter a right to rescind the agreement and cancel the lease;

That even if this covenant is not technically at law a condition precedent to the performance of the covenants of the lessee, it is, in equity, one which, coupled with the insolvency of the lessor, the lessee is entitled to have specifically per-

formed, or, failing in that, to have the lease rescinded and canceled.

These two propositions may be considered together.

"The rule has been established, by a long series of adjudications in modern times, that the question whether covenants are to be held dependent or independent of each other is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case, and to which intention, when once discovered, all technical forms of expression must give way." This language from *Stavers vs. Curling*, 3 Bingham, (New Cases,) 368, is cited with approval in *Lowber vs. Bangs*, 2 Wallace, 736, where the following was added: "Rules have been elaborately laid down and discussed in many cases for determining the legal character of covenants and their relations to each other; but all the leading authorities concur in sustaining these propositions. Contracts, where their meaning is not clear, are to be construed in the light of the circumstances surrounding the parties when they were made, and the practical interpretation which they, by their conduct, have given to the provisions in controversy."

Guided by these established rules, I am of opinion that the covenant on the part of the lessor corporation, "to arrange, provide for, and so adjust and classify all their indebtedness now [then] existing, that $15,821,000 thereof shall be represented by bonds bearing 7 per cent. interest," secured by mortgage upon the estate and property of the lessor, is not technically a condition precedent to the performance by the lessee corporation of its covenant to pay the stipulated rent. The language employed by the parties, in the light of attendant circumstances, and in view of what, in time and labor, was plainly necessary to be done in order that the indebtedness of the lessor corporation might be

arranged, provided for, adjusted, and classified, as required by the amended lease, renders it perfectly certain that the lessee remaining in possession, and enjoying the fruits of the lease, was not entitled to withhold payment of the stipulated rent until the adjustment and classification were accomplished. Such was the practical interpretation given by the lessee company to the contract. It did not, after the execution of the amended lease, withhold the stipulated rent, but promptly and regularly paid, up to the commencement of this litigation, such annual rent as it conceded to be due according to the terms of the original and amended lease. It was clearly the expectation of the parties that the lessee should pay the stipulated rent, pending such steps as the lessor corporation, *exercising due diligence*, might be required to take in order to comply with its covenant to arrange, provide for, adjust, and classify its indebtedness.

But it does not follow from all this that the lessee company is bound to wait for an indefinite or an unreasonable time for such arrangement, adjustment, and classification of the lessor's indebtedness to be effected. The stipulation, in the amended lease, upon that subject, is obviously matter of substance, not mere form. It constituted, beyond question, a very material part of the consideration for the amended lease. It would not, as I infer, have been executed by the lessee corporation without the covenant upon the part of the lessor company to arrange, provide for, adjust and classify its indebtedness to the extent stipulated. The parties by their contract have made that stipulation material, and it is not for the court to decline to give it effect according to the fair and reasonable interpretation of the words employed. What then did the parties mean by the words in the amended lease, "to arrange, provide for, and so adjust and classify." Some light is thrown upon this question by the first item of the fourth resolution passed by the lessor's board of directors at the

time they determined to issue and negotiate $10,000,000 of convertible bonds for the following purposes: "First, to take up, retire, and cancel so much of all the bonded indebtedness now existing, prior in date to these presents, against the company (made by it or made by any company merged in this company by consolidation) as that the said bond indebtedness shall be reduced to $15,821,000, leaving outstanding of the present existing bonded debt, the $15,000,000 first mortgage bonds of the company and $821,000 of the second mortgage bonds of the Columbus and Indianapolis Central Railway Company." The same idea is expressed in the proviso to the second resolution of the board, which declares that "so much of said interest fund as, in the opinion of this company, may be necessary for that purpose, may, from time to time, be used in adjusting the present outstanding bonds of the company, and other companies merged in this company by consolidation, so as to make the bonded debt of this company conform to the agreement by which said bonded debt is to be reduced to $15,821,000, as provided in the first item of the fourth resolution of this board."

The lessor's indebtedness has not been arranged, provided for, adjusted, and classified, as required by the amended lease. When this bill was filed it had made very little progress in that direction. Before this suit was commenced it was twice notified by the lessee corporation that the provision in the contract requiring such adjustment and classification was insisted upon, and compliance therewith demanded. There are, no doubt, many difficulties in the way of compliance. But the court cannot, upon that ground, discharge the lessor from the obligation of compliance. It has no right to make contracts for parties. Its duty is to construe and enforce those made.

The lessee corporation insists that the lessor has been guilty of such delay in performing its covenants that it has

now the right to a decree of rescission. That is not the theory upon which compliance with the amended lease was demanded, nor upon which the bill was framed, nor would such a decree, at this time, be just or equitable. The notice given by the lessee, under date of October 27, 1874, was that unless the amended lease was complied with, legal proceedings would be instituted to compel specific performance. The subsequent notice was to the same effect. The bill prays for a rescission and an account, and that the lessor corporation resume possession of the railroad and other demised property, free, and discharged from the lease, "*unless the defendant shall, within some reasonable time to be fixed by the court, specifically perform its said covenant aforesaid*, and *arrange, adjust, and classify, and fund its said indebtedness*, as by the terms of said agreement of February 1, 1870, it is bound to do." It would be inconsistent with the whole frame of the suit to do more at this time than to decree a performance of the agreement by the lessor.

To such a decree the complainant in the original bill seems to be equitably entitled, but is not now entitled to more. The lessor company was in such financial condition at the commencement of this action that the complainant is justified in insisting that there shall be no further delay in the required adjustment of the lessor's bonded indebtedness. The time has come in the history of both the lessor and lessee companies when the latter is entitled to have it definitely ascertained whether the terms of the original and amended lease are to be complied with. Upon the question as to what time should be given to the defendant within which to comply with its covenant, I have had some difficulty. Too little consequence is attached by the lessor company to the time which elapsed from the execution of the amended lease to the date of the notice given in October, 1874, and too much consequence is attached by complainant

to the lapse of time from that date to the submission of this cause. Under all the circumstances I have concluded that the lessor corporation may have until the 1st day of January next, within which to arrange, provide for, adjust, and classify its indebtedness, as required by the amended lease of February 1, 1870, and in default thereof the complainant has leave to move for a decree rescinding the contract between the parties, upon such terms, and with such provisions for a settlement of accounts as may be equitable.

It will be observed that I have said nothing upon the point earnestly discussed by counsel as to the rights of bondholders against the Pittsburg, Cincinnati and St. Louis Railway Company and the Pennsylvania Railroad Company, by reason of the guaranty given by the latter, and by reason of the published letter signed by the president of both companies at or about the date of the actual execution of the amended lease. I have omitted any consideration of that question because, in my judgment, it is not necessarily involved in the issues made in this case. What may now be the rights of such bondholders as against those companies, or what may be their rights in the event of a rescission of the contract of leasing, need not, and indeed cannot properly, be determined in this case. That may be the subject of distinct litigation between them and such companies, or either of them. The right of the complainant to a rescission as between it and the lessor corporation, is not affected by the obligation, if any, of the complainant, or of its guarantor, to pay the bonds issued or purchased upon the faith of the leases, and of the letter issued in December, 1874. I make no expression of opinion as to whether such obligation exists upon the part either of complainant or its guarantor.

Counsel may prepare such order as may be necessary to

give effect to this opinion, and such further orders as may be necessary for the preparation of the cause for final hearing upon all issues not now disposed of.

MARY F. LA MOTHE vs. HENRY FINK, Marshal.

Circuit Court—Eastern District of Wisconsin—April, 1879.

In Equity.

1. Personal Property—Levy and Sale—Injunction.—A mortgagee of ordinary chattels, in possession under his mortgage, is not entitled to an injunction against the marshal, restraining him from levying upon and selling such chattels, under an execution against the mortgagor.

2. Equity Jurisdiction.—The mortgagee has an adequate remedy at law, and equity should not interfere.

3. Adequate Remedy at Law does not mean ability to resort to every form of legal procedure. If any form of action at law will give such remedy, equity will not interfere.

4. Discussion of jurisdiction of Chancery over articles of personal property; and many cases cited and distinguished.

Murphey & Goodwin, for complainant.

G. W. Hazleton and *Butler, Williams & Butler*, for defendant.

Dyer, J.—This is an application for a preliminary injunction based upon a bill filed to restrain the defendant from selling certain personal property seized by him as marshal of this district, as the property of John McDonald, upon an

execution issued on a judgment at law recovered in this court by one Cook against McDonald, of which property complainant claims to have been a mortgagee in possession at the time of the seizure, and to be vested with the legal title.

The material averments of the bill are these: On the 9th day of December, 1878, McDonald executed to complainant a chattel mortgage on the property in question, to secure the payment of an alleged indebtedness amounting to about $10,000, which mortgage was on the same day filed in the office of the town clerk of the town where the property was situated, as required by the statute of the state. It is alleged that on the 13th day of January, 1879, deeming herself insecure, and in pursuance of authority given in the mortgage, she took possession of the property, with a view to selling and converting the same into money for the satisfaction of her debt, and that she has ever since held possession of the same.

It is alleged that on the 16th day of January, a suit at law was commenced in this court by one Isaac Cook against John McDonald, to recover an alleged indebtedness of about $3,100; that the property in question was seized upon a writ of attachment issued in said action, and that the marshal forcibly and unlawfully took possession of the property; that on the 6th day of February, 1879, judgment was obtained in that action by Cook against McDonald, and that on the same day an execution was issued thereon, which was levied upon the same property which, it is alleged, was at the time in the lawful possession of complainant. It is alleged that upon making the execution levy, the defendant forcibly and unlawfully dispossessed complainant of the property, and that both the defendant and Cook knew of complainant's claim to and possession of the property, and that their proceedings were taken in defiance of her alleged rights. It is

further averred that the defendant has advertised a sale of the property upon the execution held by him, and is about to sell the same, and the prayer of the bill is that he may be enjoined from selling, disposing of, or further holding possession of the property under the execution levy, and from any interference with the possession and rights of the complainant. Affidavits and exhibits accompany the bill sustaining the allegations, and from a statement annexed to the bill, it appears that the property consists of live stock, wagons, carriages, sleighs, harnesses, and a miscellaneous assortment of farming machinery and utensils, described in the mortgage as situated on the farm of McDonald.

There is no doubt that this court has jurisdiction to entertain this bill, and may grant an injunction as prayed, if the bill makes a case for equity relief, and whether it does or not was the question argued at the bar. If it does, then the court ought to grant an injunction *pendente lite*, in order to secure to complainant the final relief which she may ultimately be entitled to. If it does not, then no preliminary injunction ought to be granted. The present application, therefore, goes to the merits of the bill.

In determining the question involved, we have to consider the character of the property, the fact that complainant's interest therein originated in a chattel mortgage to secure indebtedness alleged to have been owing by McDonald to her, and the further fact that she took possession of the property for the purpose of selling and converting the same into money for the satisfaction of her debt. Accepting the allegations of the bill as true, and admitting that complainant was in possession and held the legal title to the property when it was seized, the question is whether there is such want of adequate remedy at law as entitles complainant to come into a court of equity for relief by injunction to

restrain the threatened disposition of the property at execution sale.

There is a familiar class of cases cited in the elementary works, in which, on account of antiquity or historical character or other peculiar value, jurisdiction in equity was entertained to prevent the transfer or injury of articles of personal property, or to compel their specific delivery. But it is stated that these were cases where the articles were of peculiar value and importance, and the loss of which could not be fully compensated in damages. Such was the case of the silver altar-piece bearing a Greek inscription, and of curious antiquity, and which could not be replaced in value;[1] and of the horn which constituted the tenure by which an estate was held;[2] and of the silver tobacco box;[3] and of the masonic dresses and decorations;[4] and other similar cases involving articles of property which were family relics or heirlooms.[5]

All these were cases where the chattels were articles of antiquity or curiosity, or were memorials of affection, or constituted insignia of office, and equitable interposition to preserve them to the owner *in specie*, was sustained on the ground that the recovery of their intrinsic value in money would not be adequate satisfaction to the owner.

There is another class of cases in which courts of equity have interposed to protect the owner of specific chattels in the beneficial enjoyment and use of them in specie. As where certain articles of property are placed in the hands of an agent to be held for the owner, and the agent has

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[1] *Somerset vs. Cookson*, 3 Pierre Williams, 390.

[2] *Pusey vs. Pusey*, 1 Vernon, 273.

[3] *Fells vs. Read*, 3 Vesey, 70.

[4] *Lloyd vs. Loaring*, 6 Vesey, 774.

[5] *Arundell vs. Phipps*, 10 Vesey, 139; *Nutbrown vs. Thornton*, Id. 159; *Lowther vs. Lowther*, 13 do. 95; *Macclesfield vs. Davis*, 3 Vesey & Beame, 16

threatened to dispose of them to a third party, in violation of his trust. The ground upon which equitable relief in such cases has been afforded, is found to lie in the fiduciary relation which existed between the parties, together with the threatened mischief.[1]

The principle upon which jurisdiction may be invoked to grant relief by injunction or decree for specific delivery of personal property in the classes of cases mentioned, is plainly not applicable to the case at bar, for here the case is simply that of seizure and threatened sale upon execution of ordinary personal property, the entire and actual value of which for all purposes, is ascertainable, and is wholly measurable by money, and which the alleged owner holds only for purposes of sale and conversion into money, to satisfy a debt.

On the argument such reliance was placed upon several cases decided by the Supreme Court, to sustain the present application, that they should be particularly noticed.

In the case of *The State of Georgia vs. Brailsford et al.*, 2 Dallas, 402, an obligee having recovered a judgment on a bond which was claimed by the State of Georgia under a certain act of confiscation, and execution having issued, the state filed a bill in the Supreme Court setting out its title, and a temporary injunction was granted to stay the money in the hands of the marshal until the title of the state could be tried. The obligees in the bond were British merchants. They had brought suit against the obligor in the court below. The state claimed that the bond was confiscated, and applied to the court in which the suit was tried, for leave to defend, which was refused. Judgment was rendered, execution issued, and the money was in the hands of the marshal. The state desired to establish its title before the money was paid over to the obligees. Two of the judges thought that there

[1] *Wood vs. Rowcliffe*, 3 Hare, 304.

was no ground for relief in equity. The other judges, with hesitation, concluded otherwise, and the basis of their judgment was, that as the money was in the hands of the marshal it was in the custody of the law, and that it was better that it should remain there until the law should adjudge to whom it belonged; in other words, that it was equitable to stay the money while it was yet in the custody of the law till the right to it could be tried at law. This is the scope of the decision.

Osborn vs. United States Bank, 9 Wheaton, 738, involved a franchise. The State of Ohio proposed to expel a branch of the United States Bank from the state by process of taxation. By an unconstitutional law of the state, the auditor was directed, in collection of the tax, to levy his warrant on the money and property of the bank. It was held that this was not the case of an ordinary trespass; that it was the destruction of a franchise, and amounted to expulsion of the bank from the state; that the tax would be annually levied and so that it would become a continuing wrong; that the injury done by denying to the bank the exercise of its franchise, could not be accurately calculated; that there was no remedy whatever against the principal—the state—for the injury; that the remedy would be only against the agent of the state; that no agent could make compensation for such an injury, and so that the remedy at law would be one in name merely, and that the injury would be absolutely irreparable. For these reasons, to preserve a great franchise for the future, and to prevent its essential destruction, it was held that equity should interpose by injunction.

Upon examination of *Ford vs. Douglas*, 5 Howard, 143, I do not think the case involves any question or principle such as we have here.

Pennock vs. Coe, 23 Howard, 117, holds that one bondholder of a class covered by a mortgage given to secure that

class of bonds, cannot, by getting judgment at law, be permitted to sell, and will be restrained from selling, a portion of the property devoted to the common security, because it would give him an inequitable preference over other bondholders of the same class, and would disturb the *pro rata* distribution in case of a deficiency; and moreover, would have the effect to prejudice a superior equity of bondholders under a prior mortgage. This is but the enforcement of a familiar principle in equity, such as is recognized in *Freeman vs. Howe*, 24 Howard, 450.

In *Oelrichs vs. Spain*, 15 Wallace, 211, there was involved an element of trust, which always confers jurisdiction in equity, and also the consideration of a multiplicity of suits.

Watson vs. Sutherland, 5 Wallace, 74, is much relied on to support the present application. In that case a creditor of A. levied on goods consisting of a stock in retail trade which was in the possession of B., and which it was alleged A. had, in fraud of his creditors, conveyed to B. B. was a young man recently established in trade, and was doing a profitable business; the stock was suitable for the current season and intended to be paid for out of the sales, and in fact his purchase from A. was in good faith on his part. The court held that the execution sale should be enjoined. Here were several elements of fact which furnished ground for equitable relief. B. had purchased the goods to establish himself in business. He expected to pay for them out of the sales. He had commenced business and had established a profitable trade. To take from him the property was to break up his business, destroy his credit and render him insolvent. As the court say, "commercial ruin might be the effect of closing his store and selling his goods," which had been purchased as the foundation for a business and as his beginning in business life. Here it was evident that the value of the goods alone would not compensate him for the

injury, because other consequential damages must result, which could not be recovered in an action at law; so the remedy at law was not complete and adequate. Mr. Justice DAVIS in the opinion, says: "It is well settled that the measure of damages if the property were not sold, could not extend beyond the injury done to it, or if sold, to the value of it, when taken, with interest from the time of the taking down to the trial. * * * Loss of trade, destruction of credit, and failure of business prospects are collateral damages, which it is claimed would result from the trespass, but for which compensation cannot be awarded in a trial at law. * * * The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case, must depend altogether upon the character of the case, as disclosed in the pleadings." In this case it would seem very clear that the remedy in equity could alone furnish efficient relief.

Of course as ground for the refusal of an injunction, it is not enough to say that there is a remedy at law. It must be plain and adequate, or in other words as practical and efficient to the ends of justice, and its prompt administration, as the remedy in equity.[1] And "Where the remedy at law is of this character, the party seeking redress must pursue it. In such cases the adverse party has a constitutional right to a trial of the issue of fact by a jury."[2]

The general rule in relation to the application of the remedial powers of courts of equity to compel the specific delivery of personal property to which another person has a right is stated by Mr. Story, as follows: "Ordinarily, in cases of chattels, courts of equity will not interfere to decree a specific delivery, because, by a suit at law a full compensa-

[1] *Watson vs. Sutherland, supra.*

[2] *Oelrichs vs. Spain, supra, p.* 228.

tion may be obtained in damages, although the thing itself cannot be specifically obtained; and where such a remedy at law is perfectly adequate and effectual to redress the injury, there is no reason why courts of equity should afford any aid to the party."[1] And Willard, in his Equity Jurisprudence, p. 364–365, says: "If there be nothing in the case but title to the chattel in the plaintiff on the one side, an unlawful withholding of possession by the defendant, and the chattel be one capable of being estimated in money and compensated in damages, there will be no occasion to depart from the ordinary remedies at law."

Now, bearing in mind what is the test of equity jurisdiction, it must be said of the case at bar, that it presents no peculiar or extraordinary features, and that it is plainly distinguishable from the cases that have been noticed, in which relief by injunction was successfully invoked. Why is not complainant's remedy at law, taking the facts as averred in the bill, plain and adequate? She alleges that she took possession of the property in question under her mortgage. She in effect claims legal title. She took possession and held the property for one purpose only, namely, to sell and convert it into money for satisfaction of her debt. The property is not of peculiar character or value. A recovery of its value affords complete compensation. Whatever damages she may sustain by execution sale of the property can be completely repaired at law. There was some discussion on the argument as to whether she could maintain trover or replevin in this court. Upon that question I forbear to express an opinion. But undoubtedly she could maintain trespass or trover against the marshal, if her claim be well founded, in the state court. It is said that she cannot maintain replevin in the state court.

[1] 2 Story's Equity Jurisprudence, § 706.

And so it was argued that her remedy at law was not adequate unless she could have the benefit of all possible legal remedies. But it does not follow that because she may not be able to maintain replevin, an action to recover compensation in damages, does not afford adequate remedy. Plain and adequate remedy at law does not mean an ability to resort to every remedy which the forms of legal procedure give. If any form of action at law will give a complete and adequate remedy, then she is within the principle which tests the right to resort to equity.

In an action at law for the alleged trespass, or for conversion of the property, the measure of damages would be the value of the property when taken, with interest from the time of the taking to the time of the trial, and this would under the facts as averred in the bill, cover all damages sustained. Moreover in determining value, the complainant would not be restricted to amounts realized for the property by the marshal on execution sale. She would be at liberty to recover actual value, though the marshal might not have realized one-half such value.

Application for injunction denied.

MATTHIAS SALENTINE vs. HENRY FINK, MARSHAL. THOMAS O'NEIL vs. SAME.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—APRIL, 1879.

1. HOMESTEAD EXEMPTION—GOOD AGAINST GOVERNMENT.—In final process on a judgment in a suit upon a bond given to relieve property from seizure for violation of the revenue law, the homesteads of the sureties upon such bond, in Wisconsin, are exempt. The action and judgment upon the bond must be considered as a civil proceeding.

2. POWER OF CONGRESS TO PASS EXEMPTION LAWS.—It is competent for Congress to pass laws declaring whether there shall be an exemption or not, but there having been no legislation upon that subject, it may fairly be inferred that it was intended to leave the question to the legislation of the states respectively.

3. Where there is no language in the exemption law indicating whether or not such exemption is to apply to the Government, it will be construed as applying as well to the state as to the individual.

4. HOMESTEAD EXEMPTION.—Congress not having legislated upon the subject, a writ in favor of the United States in a civil case cannot be levied upon a homestead exempt by the state law from levy under process of the state courts. *It seems:* that if Congress chooses to legislate on the subject, the U. S. courts would not be bound by state exemption laws.

Murphey & Goodwin, for plaintiff.

G. W. Hazleton, District Attorney, for defendant.

DRUMMOND, J.—These cases grow out of the following facts:

Salentine was a rectifier, and for a violation of the internal revenue laws his property was seized under a process issued by the United States. While thus in possession of the officer a bond was executed by himself and sureties, and his property released from seizure. After this was done, a suit was

brought by the United States on the bond against Salentine and the sureties, and a judgment recovered. Upon that judgment the United States sued out an execution, and the homesteads of the sureties was levied on under the execution. Thereupon, the sureties each filed a bill against the marshal who had the writ and who made the levy, asking that he be restrained from selling the homesteads of the plaintiffs.

The question is, whether, under a judgment and execution thus obtained by the United States against a resident of this state, under the law as it stands, a homestead can be levied on and sold. I am of the opinion that it cannot. It is to be observed that this must be considered, at least as to the sureties, a judgment in a civil suit. It was rendered because the defendants in the suit had not complied with the condition of the bond. It was, therefore, simply an action and a judgment upon the bond which had been given. Under the law of this state, the homestead of everyone is reserved from execution and sale, without regard to its value. The language of the statute of this state is:

"A homestead, to be selected by the owner thereof, consisting, when not included in any city or village, of any quantity of land not exceeding forty acres, used for agricultural purposes, and when included in any city or village, of a quantity of land not exceeding one-fourth of an acre and the dwelling house thereon and its appurtenances, owned and occupied by any resident of this state."[1]

The question is whether that is applicable to the United States. It must be borne in mind that real estate was not at common law subject to lien and sale on execution.

I have no doubt that it is entirely competent for Congress to pass such laws upon the subject of executions issuing out of the courts of the United States as it chooses. It can

[1] Revised Statutes of Wisconsin (1878), chapter 180, section 2968.

declare whether there shall be an exemption or not, and to what extent, but there has been no legislation of Congress upon the general subject in cases of civil actions brought by the Government against citizens or residents of the United States. This question has been left almost exclusively to the legislation of the states. And the main ground upon which I put the case, and hold that the United States cannot levy upon and sell the property of the plaintiffs, is, that there has been no legislation of Congress upon the subject, and because it is fairly inferable that it was intended to leave the question to the legislation of the states, respectively.

Undoubtedly these statutes of exemption by the states do not include cases where property is liable for taxation, unless the language clearly indicates that for the taxes the property shall not be liable to seizure and execution, and if this were for a tax that had been imposed by the Government upon the land, of course it would not be exempt from execution and sale. But I find that the general current of authority clearly is that where there is no language in the statute of a state used to indicate whether or not the exemption is to apply to the state, that the courts have generally construed it to apply as well to the state as to individuals. See the authorities cited in Thompson on Homesteads and Exemptions, Sec. 385. Therefore, if this were a judgment recovered by the state against these parties for an ordinary debt due upon a bond, the homestead would be exempt under these decisions, and being so exempt in the case of a judgment for a debt, obtained by the state, and execution thereon, it is also exempt, I think, under the same circumstances where the execution issues on the part of the United States. The case in Kentucky, cited on the argument, seems to be an exception to the general current of authority upon this subject.

Of course the law of this state is very liberal in relation

to the value of the homestead. It is without limit as to value, and many people think that it is even unreasonable. But it is a question for the legislature of the state or for Congress, and not for the courts. If Congress sees fit to legislate upon the subject, its legislation would be binding upon the property of the citizens and residents of the states, respectively, because Congress undoubtedly has a right to prescribe what shall be taken on execution in favor of the United States, on judgments obtained in its own courts.

I think this view is strengthened by section 916 of the Revised Statutes of the United States: "The party recovering a judgment in any common law cause in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted, which may be adopted by general rules of such circuit or district court."

It may be said it was not intended to include the Government by the term, "the party recovering a judgment." And that would have great force, if, as I have already intimated, it had not been decided by the various courts that have had the question before them, that although the state is not named, it is included.

So that, in the absence of any legislation by Congress upon the subject, we must hold that the homestead in this case was exempt from levy and sale on execution.

UNITED STATES vs. LEWIS RINDSKOPF *et al.*

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—APRIL, 1879.

1. ASSESSMENT AGAINST DISTILLER.—The validity of an assessment against a distiller may be inquired into by defendants answering a bill by the United States to subject to the payment of such assessment, lands transferred to them.

2. BURDEN OF PROOF.—When the defendants have rebutted the presumption of law as to the validity of the assessment the burden of proof is shifted upon the Government to establish its validity.

G. W. Hazleton, for United States.

Murphey & Goodwin, for defendants.

BEFORE DRUMMOND AND DYER, JJ. DRUMMOND, J.—This is a bill founded on an assessment which was made against Rindskopf by the United States for taxes which were due by him as a distiller, and for not making a true return of the spirits manufactured from December 1, 1874, to July 1, 1875. It is a claim for an indebtedness due from him for a violation of the Internal Revenue Laws, and because, as the bill alleges, he had incumbered his property fraudulently, and there was real estate belonging to him which could be taken for the debt due upon the assessment, if the incumbrances upon it were removed.

The bill is filed under a special statute of the United States which authorizes a bill to be filed for the purpose of enforcing any lien which may exist against the property of a distiller, or rectifier, and which declares that the parties in interest shall be made defendants to the bill, and that the

case shall be heard by the court, and decided conformably to the equities.[1]

The question for the court to determine is, whether this bill under the facts, is maintainable; and we think that it is not. I will state very briefly why we have reached that conclusion.

We concede that the assessment made is *prima facie* a valid assessment, and must be regarded as binding when made by the officers, as required under the law of the United States; but while this is so, we hold that it is not conclusive against all parties, and that it is competent for those who may not be directly affected by the assessment (as in this case where it is sought to make the assessment binding against property in which other parties claim to have an interest), to contest its validity. We admit that it is necessary for them to show that the assessment is invalid, and the inquiry is, whether on the facts of the case they have done so. We think that they have. The evidence shows the capacity of the distillery. It also shows the amount of returns that were actually made by Rindskopf to the proper officers, and that upon the returns thus made the taxes were paid. The capacity of the distillery is ascertained under the laws of the United States, and they require that there should be a tax assessed against the party running the distillery to an amount equal to 80 per cent. of its capacity.

It appears that, taking the capacity of the distillery during the six months under consideration, it was $188{,}630\frac{61}{100}$ gallons. Upon this capacity returns were made to the amount of $83\frac{1}{2}$ per cent., on which the tax was paid. It is claimed there were a little over 62,000 gallons produced which were not returned. Including what was returned with what is assessed, it is much greater than the capacity

[1] Revised Statutes, Sec. 3,207.

of the distillery during the time covered by the assessment. It is said that it was possible for the distiller to produce this amount; that the capacity as fixed by the statute does not show the actual compass of the distillery; that more spirits can be produced than the capacity, taking the data prescribed by the statute, would return; but we think this is the position of this part of the case: that while the assessment is *prima facie* evidence of its validity, the defendants have presumptively shown by evidence that the assessment is invalid; and taking the facts altogether tending to indicate the returns as made, in connection with the capacity, if they do not show true returns, it was incumbent on the plaintiff to prove that they were not true returns. In other words, the defendants having rebutted the presumption that the law makes in relation to the validity of the tax, the burden of proof is shifted from the defendants to the plaintiff, and they must show that this assessment is a valid assessment. Now, how is that proposed to be done? In no other way than by some admissions made, it is claimed, by Rindskopf, in which he said he was running "crooked whiskey" at the rate of one hundred barrels a week. We think that is a very improbable statement, considering the capacity of the distillery, and what he actually returned, and that we cannot, upon that ground, hold that the proof has been made out which it is incumbent on the plaintiff to establish, that the assessment was a valid assessment, as against the evidence produced on the part of the defendants, especially when we consider the evidence from the employés of Rindskopf, all of whom state that they had no knowledge of "crooked whiskey" being run at that time. And this is stated by the store-keepers, as well as the employés of Rindskopf. Rindskopf himself contradicts all these admissions which he is said to have made; and while there may be suspicion, we cannot decree against the interests of persons on mere suspicion, without competent

evidence to prove the fact which it is alleged actually existed.

Now, taking all these things together, we think the testimony of the United States has not satisfactorily met the proof which has been offered by the defendants that this was an invalid assessment.

We have looked into the question of the validity of the mortgage made to Wirtheimer, and the sale, but the view we have taken of the case renders it unnecessary to give an opinion on the validity of the mortgage and of the sale.

We hold, as the case stands, that it is wanting in an indispensable requisite, namely, satisfactory evidence to show that the assessment was a valid assessment. Therefore, we shall dismiss the bill.

DYER, J., concurring.

WENDELL R. KING vs. ALBERT FROSTEL *et al.*

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—APRIL, 1879.

IN EQUITY.

PATENTS.—The method of compressing and packing merchandise into convenient packages for sale and transportation, set forth in the complainant's patent of June 30, 1874, is not patentable.

L. L. Coburn and *Jenkins, Elliott & Winkler*, for complainant.

Joshua Stark, for defendants.

DRUMMOND, J.—This is a bill filed by the plaintiff against the defendants to restrain them from manufacturing and selling a kind of bale called "plastering hair bale," which the plaintiff claims to belong to him by virtue of letters patent issued to him on the 30th day of June, 1874. The plaintiff invented, as he says, a peculiar method of putting up plastering hair in bales, so as to constitute it an article of manufacture protected by the patent issued to him. He says in his specifications that "heretofore plastering hair has been packed in a mass, or a certain number of bushels baled together, varying in amount as the order required, so that when received the retail dealer was compelled to parcel out the same, and weigh it to suit his customers."

Hair had been previously put up in large bags, barrels or boxes, so that, when it was called for by a customer, it had to be taken out of this large package, and generally, being more or less dirty, it was disagreeable to separate one part of the hair from another, and the plaintiff claims that he supplied a *desideratum* in the trade by putting it up in small parcels, and tying or fastening them together so as to constitute what he terms a "bale." It is assumed that the hair is in a proper condition to be packed, and that being so, he describes his mode of packing. He says: "I first place a bushel of hair in a paper sack loosely, or only so far packed as may be readily done by hand; several of these one bushel packages are then placed side by side in a baling press. I use for this purpose the baling press heretofore patented by me. They are thus compressed forcibly together, so that the bale produced will be a compact, firm bale, occupying only about one-fifth of the original bulk. The paper bags which still envelope the individual bushels of the bale keep said bushels separate, and serve at the same time to protect the hair."

He claims that when the hair is thus put up in bushels

and fastened together in the mode designated, so as to form a bale, it constitutes an article of manufacture, the subject of a patent, and that it is a very convenient mode in which hair can be sold in small parcels, so as to meet a common demand upon dealers.

The claim at the end of the specifications is as follows: "As an article of manufacture, the bale B., of plasterer's hair, consisting of several bundles, A., containing a bushel each by weight, inclosed or incased in paper bags, or similar material, united, compressed and secured to form a package substantially as specified," and the question is, whether the plaintiff is entitled to a patent for putting plasterer's hair in packages, and fastening them together in the manner described, so as to constitute a bale. I am of the opinion that he is not. It is not necessary to decide in this case whether, taking the whole package together compressed in a baling press, which has been patented to him as he states, it is such an article as the patent law protects, because I do not understand that the bale of the defendant, which is claimed to be an infringement of the plaintiff's patent, has been compressed in the same manner as the bale of the plaintiff, and therefore, strictly speaking, it is not the bale described by the plaintiff. If the plaintiff's patent is construed so as to include any mode of pressure by which the bale is formed out of small packages of plasterer's hair, as his counsel seem to claim, then I think the patent cannot be sustained; because a person can put many articles of merchandise in separate and distinct packages and then compress them together, and that is something which might occur to any person, to take almost any article of merchandise, put it in separate parcels and bind them together. It is an exercise of the ordinary skill possessed by most persons.

I had occasion, some years ago, to examine the principle involved in this case very fully, in a bill filed to protect a

package which was claimed to be a new article of manufacture for enclosing lard. There were many claims to that patent. All of the claims were rejected except one, which was sustained as a new article of manufacture. It appeared in that case that the article produced a revolution in the trade in lard, which was put up in such a way as to stand all climates and so that it could be transported any distance without injury. With a good deal of hesitation and doubt stated at the time as to the correctness of the ruling of the court in that case, one claim of the plaintiff's patent was sustained. The case never went to the Supreme Court, the parties having acquiesced in the decision and settled their controversy.[1] I am not willing to go beyond that case, nor to encourage patents for such things as this, and to hold that nobody else can take plasterer's hair and make it up into small parcels and bind them together, no matter how, and to say that any one who does this infringes the patent of the plaintiff.

What the particular kind of machine was which is referred to by the plaintiff in his specifications by which the different packages were pressed together so as to constitute the bale, does not appear in this case, and therefore, as before stated, it is not necessary to decide upon the effect of the article of manufacture, specially described by the plaintiff, with that included. It is clear, in my judgment, that if valid at all, it is only so because of the peculiar apparatus by which the different packages are pressed together so as to constitute a bale.

It is urged that this patent has been before the Circuit Court of the United States for the Southern District of Ohio, and that the patent was there held valid. There is some question made as to whether that was a contested case so as

[1] *Tucker vs. Fairbanks*, unreported, Northern District of Illinois.

to entitle the decision to that consideration which we are always inclined to give to decisions of the Federal courts; but independent of that, I think the particular compressing apparatus described by the plaintiff must have largely entered into the consideration of the court, if after a *bona fide* contest before it, the patent was held valid.

The bill will be dismissed.

WILLIAM BARNES vs. THE CHICAGO, MILWAUKEE AND ST. PAUL R. R. CO. *et al.*

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—APRIL, 1879.

IN EQUITY.

RAILROAD MORTGAGE—FORECLOSURE.—Where a railroad mortgage has been foreclosed and bought in for the benefit of the bondholders, most of whom united in organizing and carrying on a new corporation, and afterwards certain creditors by judgments subsequent to the mortgage succeeded in obtaining a decree on a bill filed to set aside the foreclosure and subject the property to payment of their judgments: *Held*, that the decree rendered the foreclosure invalid only as to the creditors who filed the bill; and the bondholders who voluntarily took stock in the new company cannot again claim under the mortgage, nor can the trustee under the mortgage maintain a new bill of foreclosure for their benefit.

Joshua Stark, *Francis Fellowes* and *William Barnes*, *pro se*, for complainant.

John W. Carey, for defendants.

DRUMMOND, J.—This is a bill filed by the plaintiff to foreclose two mortgages, executed to him, as trustee, one in June, the other in August, 1858, by the LaCrosse and Milwaukee Railroad Company, as still subsisting mortgages upon the property conveyed to secure the bonds issued under them; one mortgage was a supplement to the other.

Prior to the date of these mortgages, the railroad consisted of two divisions, called the Eastern and Western Divisions, and there were incumbrances upon the various parts of the railroad, consisting of mortgages, or deeds of trust, as well as of judgments, so that at the time the mortgages were executed to the plaintiff, there were prior incumbrances upon both divisions. This was a mortgage upon the whole railroad, from Milwaukee to LaCrosse, as one entire road, subject of course to the prior incumbrances.

Under an act of the legislature of this state, the plaintiff foreclosed the mortgage, (we can speak of it as one mortgage, because the supplemental mortgage was made simply in connection with the first mortgage). The act of February 8, 1859,[1] provided that in case of the sale of a railroad in this state, by virtue of, or on foreclosure of any trust deed or mortgage, the trustee might himself bid a certain per centage on the property, and become the purchaser.

This, of course, was contrary to the general rule of law, which forbids a trustee, except under special circumstances, from becoming the purchaser under a sale made by himself.

But the second section of the law, provides, that, "The estate and title of any trustee named in such trust deed, or mortgage, acquired by purchase at such sale, shall be held in trust for the holders of such outstanding bonds, or obligations, in the same manner as if they had become the pur-

[1] Laws of Wisconsin, 1859, chapter 10, section 1.

chasers, in proportion to the amount of such bonds, or obligations, severally held by them."

The sale was made by the trustee under the authority of this act, the effect of which was that it operated only as a foreclosure of the equity of the LaCrosse and Milwaukee R. R. Company, and paid, *pro tanto* on the debt due to the bondholders, the amount of the bid which was made by the trustee, and instead of holding a title subject to the equity of redemption, he became the owner and had an absolute title to the property, but still as a representative of the bondholders. The case turns upon the validity of this sale made by the trustee, and upon the effect to be given to it upon the allegations in the pleadings.

After the sale was made and the property bought in by the trustee, he and the bondholders availed themselves of another statute[1] of this state, which authorized the purchaser at a railroad sale to organize a new company, and gave them the right to construct and operate a railroad, thus creating an entirely new organization springing out of the old one, and the result of the sale that was made.

Accordingly, the trustee and the bondholders under the trust deed of 1858, availing themselves of this act of the legislature, proceeded to organize themselves into a new company, known as the "Milwaukee and Minnesota Railroad Company," and formed a new organization, and as such operated some portions of the road, and it was treated by all parties and by the courts, including the Supreme Court of the United States, as a duly organized company, clothed with all the rights, franchises and privileges of a railroad corporation, under the laws of the state of Wisconsin.

Sometime after this took place, certain creditors of the LaCrosse company, obtaining judgments after the date of the

[1] Revised Statutes of Wisconsin, chapter 87, section 1,828, par. 10.

mortgage of 1858, filed a bill in the Circuit Court of the United States, for the district of Wisconsin, alleging that the sale made by the trustee under the act of the Legislature of 1859, was fraudulent and void as against them.

A decree dismissing the bill was rendered by the Circuit Court, and an appeal taken to the Supreme Court of the United States, where the decree of the lower court was reversed, and the sale made by the trustee was adjudged fraudulent and void, and the case remanded to the Circuit Court, with instructions to enter a decree in the case in conformity with the opinion of that court. A decree was accordingly entered declaring the sale fraudulent and void as against the judgment creditors; and also, declaring at the same time, in conformity with the opinion of the Supreme Court, that the mortgage was to remain as a valid security for the benefit of those who were *bona fide* holders of bonds under the mortgage, the amount being less than two hundred thousand dollars, although the amount claimed as due, and for which the property was sold by the trustee, was a much larger sum.

The Supreme Court found that a large number of the bonds were fraudulent and void, and for that reason set aside the sale.[1] It is because the Supreme Court rendered this decree, setting aside the sale, that the bill has been filed by the trustee in this case, alleging that the mortgage is in full force, and that he has a right to come in and ask for a foreclosure of it, and to redeem from any prior liens that may exist against the property mortgaged, after proper deductions are made in consequence of the rents and profits which have been received by the parties who hold the property, from the operation of the road and otherwise. As I have said, the Milwaukee and Minnesota company, operating portions of road, was treated as a corporation, with all its franchises and

[1] *James vs. Railroad Company*, 6 Wallace, 752.

privileges, and in the proceedings which took place afterwards for the purpose of foreclosing incumbrances upon the property, prior to the date of the plaintiff's mortgage, the Minnesota company was considered as representing the plaintiff and the bondholders under the mortgage of 1858, and was made a party to all the proceedings which subsequently took place, how numerous soever they were, where it was necessary that a subsequent incumbrancer should be made a party.

The Minnesota company being thus treated, and regarding itself as clothed with all the muniments and privileges arising from this sale, was called upon at one time to pay a large sum of money, in order to redeem the property from an incumbrance which was upon it, and under the order of the court, paid over four hundred thousand dollars.

This was done before the decree of the Supreme Court declaring the sale fraudulent and void. After the decision of the Supreme Court, in *James vs. Railroad Co.*,[1] the Minnesota company filed a bill for the purpose of having the money which had thus been paid, restored to it, on the ground that as a company it was destroyed by the decree of the Supreme Court, and that the money had been paid through mistake, and therefore it was entitled to recover it back.

A demurrer was put in to the bill filed in the Circuit Court of the United States, and the demurrer was sustained and the case taken to the Supreme Court, and the decree of the lower court was affirmed, the Supreme Court holding that the Minnesota company could not recover the money back.[2] It is mainly in consequence of these supposed to be conflicting opinions of the Supreme Court of the United

[1] *Supra.*

[2] *Railroad Co. vs. Soutter*, 13 Wallace, 517.

States, that the controversy arises in this case. It is claimed on the part of the plaintiff, that the sale made by the trustee was an absolute nullity as to all the world—that it was the execution of a power in a way not authorized by the mortgage, and therefore was absolutely void, being in violation of the Constitution of the United States, as the law of 1859, passed by the Legislature of this state, impaired the obligation of the contract.

It is, perhaps, not necessary, in the view which the court takes of the case, to decide this last question.

I have said that the only effect of the sale was to foreclose the equity of redemption of the La Crosse and Milwaukee Railroad Company, and to pay *pro tanto* the amount of the debt owing by that company, to the extent of the bid made by the trustee. The trustee and the bondholders had the property which was covered by the mortgage. The sale had no other effect than that indicated.

They were left with an absolute title to the property, instead of having a title subject to the equity of redemption. And it is to be observed that the La Crosse company has never made any complaint whatever in regard to the sale. No objection has been interposed by it so far as we know, during the twenty years since the sale, and nothing shows in any way dissatisfaction on the part of the La Crosse company to the mode of foreclosing the mortgage, but it seems to have acquiesced in the proceeding.

These being allegations that appear in the bill, the defendants come in and allege by plea, that upon the sale which was made, the reorganization of the Minnesota company took place and that the bondholders—all the bondholders—under the mortgage, relinquished their bonds, as they were authorized to do by statute, and took stock of the Minnesota company in their place, and so that whatever view may be taken of the effect of the sale under some aspects, it was

only invalid as against the judgment creditors who filed that bill; that it stood for all other purposes, and that it was entirely competent for the trustee and the bondholders, both agreeing to it, to convert the bonds into the stock of the Minnesota company; that no one has a right to complain, not even the trustee, and consequently that the Minnesota company was the proper representative of the trustee and the bondholders, in the litigation which took place in so many forms afterwards; and we think that is a sound position, if the facts are as stated.

If true, however irregularly the sale may have been made by the trustee, however fraudulent it may have been as against the judgment creditors who filed the bill, still, if the bondholders have voluntarily converted their bonds into stock, it is not competent for the trustee to file this bill.

The Supreme Court of the United States declared in its opinion, *James vs. Railroad Co.* (and the decree of this court conformed to that opinion,) that the mortgage stood as a valid surety for the benefit of the *bona fide* bondholders; and therefore I think that neither the act of the Legislature nor of the trustee, nor the conversion of their bonds into stock by a majority of the bondholders, nor the fact that the trustee transferred all his interest to the Minnesota company, impaired the validity of the bonds which were held by other parties who did not assent (if any did not assent) to this purchase, and who did not convert their bonds into stock. But it is to be observed, the plea alleges that they all did convert their bonds into stock, and so we hold that, if that be true, it is a valid answer to this bill, for the reasons already stated.

And we hold that the action of the Supreme Court and of the Circuit Court for the District of Wisconsin, in setting aside the sale by the trustee, had no other effect than to render it invalid as against the judgment creditors, and con-

sequently if the bondholders all came in and converted their bonds into stock, that put an end to the mortgage.

That seems to be the opinion of the Supreme Court of the United States, in the case of the *Railroad Company vs. Soutter.*[1]

The ground taken in the argument of that case by the counsel was, that the opinion of the Supreme Court and the decree of the Circuit Court following it, rendered the whole sale absolutely inoperative as to all persons, and that the Minnesota company had acquired no right, title or interest, by virtue of what had taken place.

The court said, that "the complainants (the Minnesota company,) are wrong in asserting that the property was not theirs (under the sale). It was theirs. Their purchase was declared (in *James vs. Railroad Company*,) void only as against the creditors of the La Crosse & Milwaukee Railroad Company.

"In other words, it was only voidable, not absolutely void. By satisfying these creditors they could have kept the property, and their title would have been good as against all the world. The property was theirs; but by reason of the fraudulent sale, it was subject to the incumbrance of the debts of the La Crosse company. This was the legal effect of the decree declaring their title void. Therefore, they were, in fact, paying off an incumbrance on their own property, when they paid into court the money which they are now seeking to recover back.

"They are wrong also in asserting that they made the payment under a mistake of fact. If it was made under any mistake at all, it was clearly a mistake of law."

So that there is an opinion of the Supreme Court of the

[1] *Supra.*

United States, declaring what was the legal effect of the sale, which that court declared to be inoperative and void in the 6th of Wallace.

We shall, therefore, without going further into the case, hold that the first plea is a valid plea to this bill.

But we do not, in so holding, intend to foreclose the rights of any of the bondholders, either those who did not surrender their bonds and take stock, or those who did surrender their bonds and take stock, under the plan to organize the Milwaukee & Minnesota Railroad Company.

Of course it is a question of fact, whether or not they did surrender their bonds and take stock.

And we think, as stated before, that those who did not surrender their bonds and take stock, if there are any such, were not bound by what occurred, and that this mortgage is valid as to all such bondholders.

Dyer, J., concurring.

RICHARD IRWIN vs. MONROE BAILEY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—MAY, 1879.

1. RAILROAD MORTGAGES—INDORSEMENT.—The president of a railroad company has the right to indorse and assign notes and mortgages given to it to aid in its construction, and the indorsee before maturity takes the notes free from any equities between the maker and the company.

2. INDORSEMENT.—Where the note and mortgage were first attached to a bond of the company and transferred as collateral to it, a subsequent indorsement by the president is valid to pass the legal title to the equitable owner.

3. A SUBSEQUENT INDORSEE may sue in his own name, though he has no actual interest in the note, if it was indorsed to him for that purpose.

Sleeper & Whiton, for plaintiff.

Lawrence, Campbell & Lawrence, for defendant.

DRUMMOND, J.—The defendant executed a promissory note on the 7th of March, 1856, payable to the Racine & Mississippi Railroad, or order, for $4,000, in five years from May 10, 1856, with ten per cent. interest, payable annually. This note was secured by a mortgage, and was given to the railroad company, to enable it to raise money for the construction of the road. It was agreed on the part of those who represented the railroad company, that a certain indemnity should be given to the defendant by which he should be relieved from apparent liability existing upon the note and mortgage; and certain representations were made by them at the time, or before the note was executed, which constituted the inducement for the plaintiff to execute the note and mortgage; and it may be assumed that upon

the faith of these representations the papers were executed and delivered to the railroad company. The railroad company took the note and mortgage and attached them together, with a bond on its own part, and an assignment, as it was claimed, of the note and mortgage contained in the bond, being in a form, as it was supposed, to enable the company to raise money upon it; and accordingly, as the evidence shows, in 1857 money was obtained. The weight of the evidence, I think, is, that the money was raised upon the note and mortgage and the bond, and that they were transferred to the City of Glasgow Bank for value received. The bank thus became the holder of the note and mortgage. This was before the note became due, and of course, unless it had notice of any equities which might exist between the maker of the note and the railroad company, it would not be bound by them. There is no evidence whatever that the City of Glasgow Bank had such notice, and consequently, it cannot be bound or affected in any way by those representations. Then, after the bank became the equitable owner of this note, mortgage and bond of the railroad company, it was transmitted to the plaintiff, and he was instructed to represent the bank. At this time the note was not indorsed; that is to say, it had no memorandum written upon it, which, so far as the indorsement of the railroad company was concerned, would constitute a legal transfer of the property, unless that transfer was made by virtue of the assignment of the railroad company, attached with the note to the mortgage.

It is not necessary to decide what was the effect of the assignment contained in the bond, because when the plaintiff received the note it was transmitted with the bond and mortgage to Messrs. Strong & Fuller, of Racine, in 1858 or 1859, before the note was due. The note not containing the formal indorsement of the railroad company, Mr. Fuller took it to the president, and he indorsed the note in blank,

as president of the railroad company. Now, the question is, whether he had the right to make this indorsement transferring the legal ownership of the property to any third person, or to make the note transferable by delivery.

It seems to me, under the evidence, that he had that right. He was the financial agent, or one of them, of the company to make negotiations of the assets of the company, to raise money upon them, and accordingly, under this authority, this particular note, bond and mortgage were transferred to the City of Glasgow Bank, and full consideration received. There is no evidence indicating that the power which was thus given to Durand, as president of the company, was revoked, and in view of the fact that the bank had become the equitable owner of the note, bond and mortgage, whatever view we may take of the effect of the assignment of the bond, undoubtedly Mr. Durand had the right to carry out, in good faith, the contract that had been made with the bank, and to indorse the note. This conferred upon the bank the ownership of the note, making it thus the legal indorsee of the note, as it previously had been the equitable owner.

It is to be observed that at this time the plaintiff was the agent of the bank. The legal effect of the indorsement was, that it transferred the note to the bank, and thus, if the plaintiff had any interest in it, he was simply the indorsee, holder, or bearer, as the agent of the bank. This was before the note had matured, and I can have no doubt, under the evidence in this case, that the plaintiff was clothed with all the equities of the City of Glasgow Bank, and that he can sustain his right to sue and to recover upon the equities and legal rights of the bank. The plaintiff, under what I consider the well-settled principles of law, had the right as the agent of the bank, after the maturity of the note, to bring a suit upon it, and the fact that he has no interest whatever in the note, and paid nothing for it, cannot deprive

him of the right, provided it was transmitted to him for that purpose, and the suit was brought as the agent and by the consent of the bank. These being the principles of law, it is immaterial what statements may have been made by the agents of the railroad company at the time this note was executed. It was a negotiable note, transferred to the railroad company, and payable to its order. The defendant trusted to the representations of the railroad company. If they were untrue, or a fraud was practiced upon him, it was he who trusted the company. He transferred the note and mortgage, and the rule is well settled, that when one of two innocent persons must suffer, he must suffer who has enabled a third person to negotiate a security and to obtain money upon it. So as between the bank and the defendant, the latter must suffer, and not the bank which has paid value for this note, and without any knowledge of any circumstances calculated to throw doubt upon it.

The evidence has been allowed to go in with very great latitude; scarcely any restriction has been placed upon it by the court, the case having been tried without the intervention of a jury. Counsel were informed that whatever evidence there was that might have any bearing on the issue, would be admitted, subject to the legal rights of the parties. Consequently all the evidence relating to what is alleged to have been a fraud practiced by the agents of the railroad company upon the defendant, has been admitted, subject, of course, to be controlled and limited by the legal discretion of the court when the testimony was all before it. And the testimony being thus before the court, and as the facts in relation to the execution, transfer and delivery of the note to the City of Glasgow Bank, prove that value was paid for it, and that the bank had no knowledge whatever of any of the alleged frauds or misrepresentations, I think all of the evidence relating thereto is immaterial, and really inadmis-

sible as against the bank, or as against the plaintiff as its agent. The release referred to in the pleadings was given long after this suit was instituted, and can have no legal effect as against the plaintiff.

The plaintiff is therefore entitled to recover in this case, and the issue and judgment of the court will be accordingly.

MALCOLM C. TURNER *et al*, vs. THE INDIANAPOLIS, BLOOMINGTON AND WESTERN RAILWAY CO. *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—MAY, 1879.

1. JUDGMENT AGAINST RECEIVER.—A receiver of a railroad appointed in foreclosure proceedings is the agent of the bondholders and the trustees, and a judgment rendered against him by a court of competent jurisdiction, is binding upon the interests of the bondholders.

2. LIABILITY OF RECEIVER.—A receiver is liable for damage to engines rented by him, arising from omission to make necessary repairs.

3. APPEAL BOND TO COVER INTEREST.—Where a party by appealing ties up a fund in court, the bond should provide for payment of interest during the pendency of the appeal.

John M. Butler, for petitioner.

J. D. Campbell, for bondholders.

DRUMMOND, J.—The main line of the Indianapolis, Bloomington and Western Railway was sold, and a large sum of money has been paid into court, and this is an application made by the Rogers Locomotive & Machine Works for the

payment of a portion of that sum, and the question is whether the court ought to allow the claim.

The facts of the case which give rise to this question seem to be substantially these: There was a bill in equity pending in the state court, growing out of the floating indebtedness of the railway company, and a cross-bill was filed by the Farmers' Loan & Trust Company as the mortgage trustee of a large indebtedness due from the company on the bonds and coupons. At the time this suit was pending in the state court, application was made to the court, by the receiver appointed in that court, setting forth that there was a controversy between the Rogers Locomotive & Machine Works and himself, in relation to a claim of the former against him, as receiver, and the court directed a suit to be brought in the state court to settle it, and an action of replevin was accordingly brought. It consisted of two branches: one was as to the right of the Rogers Locomotive & Machine Works to the possession of certain locomotives which were in possession of the railway company; and the other was in relation to the claim for damages, and rental for their use during a certain time.

It is important to consider the aspect of the case as it existed at that time.

There was a bill in chancery pending in the state court, with a cross-bill, to foreclose the deed of trust and sell the property to meet the indebtedness of the company due upon the bonds. There was a suit pending in the state court authorized to be brought by the Rogers Locomotive & Machine Works against the receiver, for the purpose of settling the controversy between him and that company. This being the *status* of the two cases, they were both removed to the Federal court, the replevin case in the first instance, and afterwards the chancery suit. Having both come into the Federal court, they were subject to all the rights which had been

acquired by the parties respectively in the state court, and consequently, unless changed or modified by the order of the Federal court, the action of replevin in the Circuit Court of the United States, was subject to the order which had been made by the state court authorizing the suit to be brought there, and the case in chancery was also subject to the order which had been made in the state court in relation to the replevin suit. Therefore, we cannot disconnect the two suits, in considering the question which arises in this case. There were two cases, but the suit at law grew out of the suit in chancery, and was in some respects auxiliary to it, so that when it came into the Federal court it was, as in the state court, connected with the case in chancery, and when the order was made by consent in the Federal court to refer it to the master in chancery, it must be considered as a part of it. When the property was removed from the state to the Federal court, the receiver of the state court exercised the same control over it as in the state court, and he was recognized by the Federal court as the receiver of the property, and became its receiver; and I cannot doubt that the Federal court had the right to make the order which was made, and that this order was binding on the equities and legal rights of all parties in relation to the subject-matter of controversy in the replevin suit. Undoubtedly the court had jurisdiction of the case, and had the right to pass upon and settle the controversy, and to adopt this mode of settlement with the consent of all parties.

The receiver represented all parties, the trustee, and all claimants who had claims upon the property, and was the receiver for the interest of all. That being so, what was the legal consequence growing out of the settlement of the controversy between the Rogers Locomotive & Machine Works and the receiver, by the Circuit Court of the United States?

When this matter was referred to the master, and he made

his report, and the court entered judgment, it bound all parties. It bound the parties connected with the chancery suit in the same manner, it seems to me, as it bound the parties in the suit at law, because, as I have said, this latter was an emanation of the chancery suit. Perhaps the chancellor might have control over the suit analogous to that which he would have if an issue out of chancery had been directed by the court; if not for all purposes and to every extent, certainly to some extent; but there has never been any interference by the court in the chancery suit with the replevin suit. I agree, however, that it can be only binding in relation to all matters that were legitimately before the court in the replevin suit, and which were properly settled by the judgment in that suit, and consequently, the question is, whether the controversy was of such a character as to be binding, as to the point in question, upon the bondholders and the trustee, and I cannot see why it is not.

The rental was a claim against the receiver, as such, for the use of certain locomotives during the time he was using them in the operation of the road, and constitutes a just claim against him, and against the court which was operating the road. Why, then, is not the receiver and the court bound for the amount which was found by the court in the replevin suit for the use and rental of the locomotives during the time mentioned? I know of no good reason. It was certainly just as much a part of the operating expenses of the road as labor or material and supplies, and there being a controversy as to what should be the amount paid for the rental, submitted and determined as stated, it seems to me that the decision of the court and its judgment must, at present, be considered final and conclusive on the subject.

Then, as to the other question, whether the receiver is liable, and whether the damage sustained in the use of the

engines by him constitutes a just charge as for the operation of the road.

Perhaps that part of the case is not so clear as the other, but still I think in principle it is not distinguishable. The locomotives were used by the receiver in the operation of the road, and the rental is part of the expenditure for the use of the various engines. Compensation is claimed because in the use there has been an omission to make the proper and necessary repairs. Now, the use of the locomotives constitutes one claim, and for that just compensation should be paid. If there has been any act omitted to be done, which the receiver ought to have done, namely, if he has omitted making the necessary repairs, then that would seem to constitute another and as just a claim against the receiver as for the use of the locomotives. It would necessarily be an important element in the value of the engines to the Rogers Locomotive & Machine Works and I think that it is reasonable, and that the receiver should be held accountable as an officer of the court, and for which the income of the road and proceeds of the property should be liable. It is difficult to discriminate between a claim of this kind and one for supplies and materials, or labor, or for the rental of "rolling stock," such as locomotives and cars. The counsel insists that it is simply a non-compliance with a contract on the part of the receiver. Whether there was a wrongful act by the receiver does not, perhaps clearly appear; but suppose it were so, and that the receiver, by his own wrong, as by negligence, omitted to make the necessary repairs, and take the proper care of the locomotives in operating the road, ought he not to be liable?

I am aware that the case of *Davenport vs. Receivers*, 2 Wood's Reports, 519, seems to go the length of holding, if I understand it, that neither the receiver nor the property in possession of the court is liable for the negligence of the

receiver, or that of his employés. The view that has been taken in this circuit has been somewhat different. We have often held that the receiver is liable for the negligence of his employés, and we have required him to pay out of the income of the road the damages which parties have sustained by his negligence, or that of his employés. The operation of a railroad by a court through a receiver is something out of the routine duty of courts and receivers. There must be exceptional rules applicable to such receivers. The receiver holds the property for preservation, and it may be questionable whether the receiver should be himself personally responsible in damages for the negligence of his employés, and whether public policy does not require that the receiver, as the organ of the court merely, should be answerable under his contract as operator of the road. The rules upon this subject have not been very clearly and satisfactorily settled, and therefore we should proceed with some caution in cases of this kind; but I feel no hesitation in holding in this case, the fact being that the receiver did not make the necessary and proper repairs of these engines, and having suffered them to be damaged and injured, that he ought to make compensation, and therefore I shall allow that claim as well as the other. The money is in court, to which this applicant has a just claim, and whether or not this judgment is valid is a question we must consider, on this application, as settled.

It is true an appeal has been taken to the Supreme Court of the United States from this judgment. It may be reversed, but until reversed we must regard it as a binding judgment. It was competent for the parties affected to supersede it by giving the necessary bond. They have not chosen to do so, but have only filed, as I understand, the ordinary bond for costs. Therefore, the judgment is left in full force, and we have to treat it as *res adjudicata* in this court. There is a way, perhaps, in which these parties can

avail themselves of any error, either in the order which the court will now make, or in rendering judgment in the replevin suit, and that is by appealing from the order of this court, and giving the necessary security.

The fund is in court, and cannot be taken out except by its order; and in requiring a *supersedeas* bond, of course the court would take into consideration the fact that the fund was here subject to the order of the court at any time whenever, if the case should go to the Supreme Court, the rights and equities of the parties are determined; and if this order should be affirmed, then the money in court, with any security that may be given, would meet the claim which the Rogers Locomotive & Machine Works may have, so that I shall direct the money to be paid over, and if the other party desires to appeal from the order which I make, of course it can do so, upon giving the necessary security, which would have to be enough to cover interest during the time the case might be pending in the Supreme Court, costs and other incidental expenses and damages.

ALBERT A. PIERCE *et al.* vs. JAMES G. BROWN *et al.*

CIRCUIT COURT — NORTHERN DISTRICT OF ILLINOIS — MAY, 1879.

POWER OF ATTORNEY TO COMPROMISE—SATISFACTION OF JUDGMENT—WHEN SET ASIDE.—An attorney was employed to bring suit and collect the amount due. After obtaining judgment against the defendant, the attorney compromised with the defendant and accepted less than the full amount—and entered the judgment fully satisfied. The attorney failed to turn over the amount received: *Held*, that plaintiffs were entitled to have the satisfaction set aside, on condition that they would indorse on the judgment the amount received by the attorney.

Motion to set aside satisfaction of judgment.

Dent & Black, in support of motion.

Tuley, Stiles & Lewis, contra.

BLODGETT, J.—At the October term, 1876, of this court, on the 15th of November, the plaintiffs recovered a judgment against the defendant for the sum of $4,730 and costs. One D. E. K. Stewart was the attorney for the plaintiffs, and shortly after the recovery of the judgment negotiations were opened between the defendant Hawkins, and Stewart for a settlement of the matter, which resulted in a compromise, by which Hawkins paid Stewart, as the plaintiffs' attorney, the sum of $4,150, and Stewart entered a satisfaction of the judgment, the amount paid being $640 less than the amount for which the judgment was recovered. The plaintiffs now move to set aside this satisfaction on the ground that Stewart

had no authority to make the compromise. No part of the money received by Stewart was ever paid to the plaintiffs, it being admitted, as part of the facts of the case, that Stewart absconded, and did not account to his clients for the money which he had received under this compromise. There is no dispute really about the facts in the case. Stewart was simply employed to bring this suit to collect the amount due. He was not expressly, nor impliedly, so far as the proof shows, authorized to accept less than the amount due in full satisfaction.

It is conceded by the defendants' attorney that the entry of full satisfaction is, under the facts, void and inoperative, at least voidable on the motion of the plaintiffs; but it is also insisted that the payment made to Stewart should be applied, so far as it would go, to the satisfaction, and that the court should now direct an entry to be made setting aside the satisfaction as to the unpaid $640.

The plaintiffs in support of the motion cited a large number of cases which go clearly to maintain the proposition that an attorney authorized to collect simply, has no authority to compromise, and there is no dispute about that question, in the state of Illinois especially, as there is a large number of cases sustaining the plaintiffs' proposition; but the question in this case is, whether the plaintiffs are entitled to have the satisfaction set aside entirely, and be authorized to collect the full amount of the judgment. The contest in this motion has been in reference to the extent to which this payment should be treated as a satisfaction.

There is no evidence in the case that there was any fraudulent collusion between Hawkins, the defendant who made the settlement, and Stewart; but on the contrary whatever evidence there is bearing on that point shows that Hawkins was acting in good faith; that Stewart was threatening to issue an execution, and interfere with real estate Hawkins

had in the city of Chicago; and Hawkins stood in reference to this whole claim merely in the light of surety, and under the circumstances entered into this negotiation for a settlement which resulted in a deduction of $640 from a claim of over $4,700, and on Stewart proposing to make that deduction, which he claimed he had a right to make, and representing to Hawkins he was authorized by his clients to make a settlement, Hawkins paid him the money in satisfaction of the judgment.

It is admitted by the attorney for the plaintiffs that if the money had been paid to Stewart on account, it would be a good payment, no matter if Stewart did fail to respond to his clients. It is conceded that Stewart, under his powers to collect, could have received less than the full amount, and applied any payment as far as it went. He had power to receive the money, and apply it on the judgment. The receipt of the money, therefore, was within the authority of the attorney, but he had no authority to release, and the attempt on his part to make the release was an act in excess of his power. The complaint of the plaintiffs, therefore, against Hawkins, that he paid Stewart the money, but that Stewart failed to pay it over to the plaintiffs, might have followed, as far as that is concerned, as readily if he had paid him the full amount, as if he had only paid part of it. But it is conceded that if Hawkins had paid Stewart the full amount, the satisfaction would have been binding. I think, then, under all the circumstances of the case, without quoting the authorities which have been cited on the part of the defendant, that the plaintiffs are entitled to have this satisfaction set aside; but at the same time only on condition that they shall indorse the amount which was received by Stewart on the judgment, so that the judgment will remain in force as to the unpaid portion.

I have been somewhat embarrassed in regard to the case

because the court is asked to pass upon the rights of parties upon affidavits, and without that investigation of the facts in the case which can be made on a trial, and where, perhaps, it may be a question whether the plaintiffs, if they wished to do so, could assign error to the ruling of the court. There are some authorities, however, one in Massachusetts, which I have examined, where error was assigned upon the refusal of the court to set aside a satisfaction; and it may be that the plaintiffs can get this question before the Supreme Court on the record as it now stands.

THE ATLAS NATIONAL BANK vs. THE F. B. GARDNER COMPANY *et al.*

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—JUNE, 1879.

IN EQUITY.

1. CORPORATION—BANKRUPTCY OF STOCKHOLDER AND OFFICER.—The individual bankruptcy of a person, who is a stockholder in, and a director and officer of, a corporation which is not in bankruptcy, does not incapacitate him from exercising his functions as such officer of the corporation, nor render inoperative and void as to third parties the acts and conveyances of the corporation done and executed through him as its representative.

2. OFFICER DE FACTO OF CORPORATION—POWER TO ACT.—Where by the law under which a corporation was created, it was required that the directors and officers should be stockholders and be elected for one year, and the president became bankrupt and subsequently acted as the president of the corporation: *Held*, that notwithstanding his bankruptcy, he was the president *de facto* of the corporation, and as such his acts were, in the absence of fraud, the acts of the corporation.

This was a creditor's bill. The leading facts in the case were these: In 1876, and for a considerable time prior thereto, The F. B. Gardner Company was a corporation organized under a law of Wisconsin, owning a large quantity of real estate and personal property, and was engaged in the manufacture of lumber, at Pensaukee, in Wisconsin. In 1875 the corporation executed a mortgage to one White upon a large part of its lands and real property to secure certain indebtedness, which mortgage was afterwards transferred to and held by complainant, and was during the year 1876 foreclosed in this court, the bill to foreclose being filed March 11, 1876. After sale of the mortgaged property and at the October term, 1876, a judgment for a deficiency amounting to twenty-one thousand one hundred and six dollars and eighteen cents was rendered in favor of the complainant against the defendant company, upon which execution was issued and returned *nulla bona.*

On the 10th day of March, 1876, the stock of the defendant company consisted of five thousand shares of one hundred dollars each; of which the defendant, F. B. Gardner, held four thousand nine hundred and eighty-nine shares, one John Spry held ten shares and one J. C. Gardner held one share. These three parties constituted the board of directors; F. B. Gardner being the president and J. C. Gardner being the secretary of the company, and until the 4th day of September, 1876, the books of the corporation showed the ownership of stock as above stated. On said 10th day of March, 1876, a petition for the adjudication of F. B. Gardner as a bankrupt was filed in the District Court of the United States for the Northern District of Illinois, and on the 28th day of March, he was adjudicated bankrupt. On the 29th day of April, 1876, an assignee in bankruptcy was appointed. On the 2d and 31st days of August and the 2d day of September, 1876, the defendant company, F. B. Gardner acting as presi-

dent and J. C. Gardner acting as secretary, made conveyances of numerous tracts and parcels of lands, then owned by the company and not covered by complainant's mortgage, to E. O. Grosvenor, H. C. Durand, Herman Ruther, Elijah M. Haines, George Schecht, Geo. L. Tracy, Martin Ryerson. E. Meyer, the heirs of Robert McMullen and one Mrs. Ross (all of whom are defendants in the present bill), to secure the payment of indebtedness then owing by the company to said parties respectively, the conveyance to Durand being in trust for the benefit of other parties who were then creditors of the corporation, and who were also defendants in this bill; all of which conveyances purported to be and were executed as the deeds of the corporation.

On the 4th day of September, 1876, there was a sale at public auction by the assignee in bankruptcy of F. B. Gardner of the four thousand nine hundred and eighty-nine shares of stock he held in the defendant corporation, such sale having been originally advertised to take place on the 3d day of August, and having been postponed until the 4th day of September.

It was claimed by complainant that the adjudication of F. B. Gardner as a bankrupt by the District Court in Illinois, the appointment of an assignee and the assignment to him of the bankrupt's estate on the 29th day of April, 1876, operated to extinguish his ownership of the stock in the defendant company, and to transfer such ownership to the assignee, and therefore, to disable Gardner thereafter to act as a director and officer of the corporation, and as a consequence take from him the power to make for the company the conveyances of property before mentioned; that the parties receiving the conveyances had knowledge at the time, that Gardner had been adjudicated a bankrupt; that such conveyances were made when the defendant company was insolvent, and when it was expected that there would be a

deficiency arising on the sale of the premises covered by complainant's mortgage which was then in process of foreclosure, and that these conveyances were fraudulent and void.

The defendants answered the bill, alleging that the conveyances of real estate to them by the defendant company were made to secure the payment of just and *bona fide* indebtedness then owing to them, and that the same were made in good faith, and denying all charges of fraud or fraudulent intent in their several transactions with the defendant corporation.

W. T. Burgess, for complainant.

Luther S. Dixon, for defendants.

After disposing of other question in the case, the opinion of the court proceeded as follows.

Dyer, J.—There remains for consideration another question, and which was the principal one discussed at the bar, namely, the effect of the bankruptcy of F. B. Gardner upon his power to act in the transaction sought to be annulled, as a director and as the president of the defendant company. The position is taken by complainant's counsel that the effect of the bankruptcy proceedings instituted against Gardner, in Illinois, in March, 1876, was to transfer his ownership of stock in the company to the assignee in bankruptcy, and that thereafter he was disqualified from acting as an officer of the company, and consequently that he had not the power to make for and in behalf of the company the conveyances to the defendants which the bill seeks to set aside.

The testimony does not show when the stock held by Gardner came into the actual possession and control of his assignee in bankruptcy, but it tends to show that after the bankruptcy of Gardner, the business of the corporation, so far as

it had business to do, proceeded as it had done before. The stock was advertised to be sold by the assignee, as part of the assets of Gardner, on the 3d day of August, 1876; but the sale was postponed to the 4th day of September. It is charged that this postponement was procured by Gardner, and as part of a scheme to enable him to consummate the transactions complained of, before there should be a sale. The testimony I think fails to sustain this charge. The only testimony on the subject is that of Gardner himself, who says that some of his creditors suggested a postponement in order to ascertain something further about the value of the stock; that he had some idea of bidding on the stock, and that he made suggestions to others to bid; that he thought the stock would bring more if other parties were prepared to bid, but they did not then interest themselves in it, and the sale was adjourned thirty days. He says further, that he might have had some influence in having the sale postponed, but the circumstances as they are disclosed by the testimony fail to establish a fraudulent purpose in procuring the postponement.

It seems not very material why the sale was adjourned, if the position is sound that by virtue of the bankruptcy proceedings, and by operation of law, Gardner was divested of the right and power to act as an officer of the defendant company, after the assignment in bankruptcy.

Now the question fairly stated is, does the individual bankruptcy of a person who is a stockholder in and director and officer of a corporation which is not in bankruptcy, to such extent incapacitate him from exercising his functions as such officer of the corporation as to render inoperative and void, as to third parties, the acts and conveyances of the corporation when done and executed through him as its representative. A further feature of the case, in connection with the question, is, that Baker at the time of his settle-

ment, and most of the other defendants at the time they took their conveyances and mortgages, had knowledge or information in a general way that Gardner was in bankruptcy, some of the parties being creditors of both the corporation and Gardner. By the statute under which the corporation was organized, it is provided that the stock, property, affairs and business of the corporation shall be under the care of at least three directors to be chosen annually by the stockholders, and who shall be stockholders, and shall hold their offices for one year, and until others shall be chosen in their stead. Further, that the directors shall choose one of their number president and such other officers as may be required, who shall hold their offices one year, or until a majority of the stockholders choose others in their stead. Power is given the corporation to acquire, mortgage and dispose of real and personal property, and the stock is declared to be personal property, transferable only on the books of the corporation. And it is to be observed, that there is no statutory declaration of a vacancy in the office if an officer ceases to be a stockholder. The question that is presented for solution may perhaps, in view of the manner in which it arises, be said to be one of first impression. In the absence of fraud, I can hardly think that its determination is to be affected by the fact that the third parties dealing with the corporation knew that Gardner was in bankruptcy. Complainant's case must stand or fall upon the proposition that Gardner had not power to act as a director or representative of the corporation, because the ownership of his stock had passed to his assignee in bankruptcy, and therefore that his acts were void. If the affirmative of this proposition be sound, it would seem that the individual bankruptcy of Gardner absolutely vacated his office of director and president of the corporation, so that he could not thereafter be such officer either *de jure* or *de facto*.

I cannot bring my mind to such a conclusion. For even

if the legal title to the stock passed to the assignee in bankruptcy by virtue of the bankruptcy proceedings, still, up to that time Gardner had been an officer of the corporation, duly chosen. His term of office had not yet expired. The statute under which the corporation was created, provided that he should hold his office till another should be chosen in his stead, and it would seem that, so far as third parties were concerned, if he did not continue to be an officer *de jure*, he was thereafter an officer *de facto*, whose acts would be binding on the corporation, and would be the acts of the corporation. It is true the statute of incorporation provides that the officers shall be stockholders, but that provision is directory, and, as before observed, there is no statutory declaration that a vacancy shall be deemed to exist if the officer, before his term expires, shall cease to be a stockholder. It has been held that one who is elected an officer in a corporation by the body in which the power to elect is vested, but by a less number of that body than the charter authorizes, is an officer *de facto*, and that his acts, as respecting third persons, are valid.

In the case of *Bank of the United States vs. Dandridge*, 12 Wheaton, 64, where it appeared "that the directors of the parent bank, empowered to establish offices of discount and deposit, subject to such rules and regulations as they should deem proper, passed a by-law, directing 'that the cashier of each office shall give a bond * * * with two or more approved securities with condition for his good behavior and faithful performance of his duties to the corporation,' and a fundamental article of the constitution of the bank directed 'that each cashier or treasurer, before he enters upon the duties of his office, shall be required to give bond,' etc., it was held that a cashier appointed and permitted to act in his office, without giving such bond, or any bond whatever, was a legal agent of the corporation; that his acts and contracts

within the scope of his authority were valid, whether in favor of the bank or against it in favor of third persons, and that the charter and by-law were directory in this particular, and the taking of the bond, not made a condition precedent. It was admitted, however, that if the statute had prescribed that the cashier should not be deemed for any purpose in his office until an approval of his official bond by the proper board, his acts would have been utterly void unless his bond had been given and approved." Angell and Ames on Corporations, section 285. Just so, it may be said, would be the fact in the case at bar, if the statute declared that upon ceasing to be a stockholder, the office of director should be deemed vacant. Before his bankruptcy, Gardner was an officer *de jure;* afterwards he continued to act under color of right, and so was an officer *de facto.* If a corporation elect a person a director who is ineligible to that office and permit him to act as such, the corporation will be bound by the acts which he performs within the scope of the authority possessed by a director.[1] And as his acts cannot be questioned by the corporation, they cannot be by those who claim under the corporation, or collaterally.

And it is to be borne in mind that the power of Gardner to act as an officer of the corporation is questioned, not by direct proceeding to vacate his office, but by a party who stood originally in the position of secured creditor, in a proceeding against other creditors, whose demands, presumably *bona fide* and valid, have been secured through the acts and instrumentalities, the validity of which is questioned. And so far at least as such creditors are concerned, their equities seem to be equal to those of complainant, provided their transactions with the corporation are untainted by fraud.

On the whole, the only satisfactory conclusion I can arrive

[1] *Despatch Line of Packets vs. Bellamy Man. Co.*, 12 New Hampshire, 205.

at is, that, notwithstanding his bankruptcy, Gardner was director and president *de facto* of the corporation, and as such, in the absence of fraud, the acts performed by him were the acts of the corporation, and that the transactions of the corporation, consisting of the settlements, conveyances and mortgages in question, were valid and should not be disturbed.

Bill dismissed.

WILSON PACKING COMPANY *et al.* vs. WILLIAM B. CLAPP.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JUNE, 1879.

IN EQUITY.

1. PATENTS—CANNED BEEF—NOVELTY.—The method of cutting up meat, preparing it with antiseptics, pressing, putting into cans, pressing afterwards, and then hermetically sealing the cans, is not patentable, for want of novelty.

2. A patent for cooked meat put up in a solid form, in its natural state, without disintegration or desiccation, in hermetically sealed packages, can not be sustained as a new article of commerce.

3. FORM OF CAN.—The pyramidal form of can, for packing food, is not patentable.

4. The Marshall and Wilson patents for canning beef not sustained.

Munday & Evarts, *J. N. Jewett* and *W. H. Clifford*, for complainants.

Eldridge & Tourtellotte, for defendant.

BEFORE DRUMMOND AND BLODGETT, JJ. DRUMMOND, J.—The only question in this case necessary to be considered is, whether the two things which are the subject-matter of the patents are in themselves patentable, namely, the mode described in which meat is compressed, and put into cans, and the mode described of making the cans or vessels in which the meat is placed.

The first patent is that of W. C. Marshall, originally issued July 12, 1864, and re-issued May 25, 1875. It relates to the putting up and preserving of meats. Mr. Marshall's mode, as I understand, is this: he prepares the meat, it being cut in proper form, and in its raw state, by what are called antiseptics; that is, by the various methods of preserving meat with salt, saltpeter, etc., and when the meat is in this condition he subjects it to a strong pressure. It is then put, in the proper quantity, into a package, box or can, of the required size, and is there also subjected to pressure. Then, in the usual way, the air is expelled from the package by heat, and it is hermetically sealed.

This seems to be the whole process as described by Mr. Marshall, and in his claim he declares that it is for packing and preserving meat, in subjecting it, after it has been submitted to preserving processes, to a heavy pressure, and packing and hermetically sealing in packages, or boxes, compressed meat, as described.

The question is whether of itself, this was a patentable subject, viz.: cutting up meat in its raw state, putting it into antiseptics, subjecting it to pressure, as in a mold, before and after it is put in the box or package, and then hermetically sealing it. It is admitted that the manner in which the package is hermetically sealed was well known. That is not claimed, but only the particular way in which the meat is prepared, put up and placed in the box or package.

The main difference as I understand, between the patent

of Marshall and that of William J. Wilson, is that in the latter, which was originally issued on the 31st of March, 1874, and re-issued on the 6th of April, 1875, Wilson describes his meat as being first cooked thoroughly, at a temperature of 212° Fahrenheit, so that all the bone and gristle can be removed and the meat retain its natural grain and integrity. In both patents, it is claimed that the meat retains all its nutritious qualities, and that it is not desiccated, or dried, and in Wilson's patent, after it is thus cooked, it is compressed, as in Marshall's, in the box or package, and then it is hermetically sealed. These two modes of preserving meat appear to be somewhat different from any of those which have been presented to the court, in this, that the meat is not put up in brine or any other liquid, neither is it dry or desiccated, but it remains in such a form that it can be reduced to a compact mass, so as to retain most of the nutritious qualities of the meat. I take it for granted that it is impracticable to cook meat as Wilson proposes it should be cooked, (although nothing is said as to the manner in which it is to be cooked,) either by steam or water, or otherwise, without losing some of its nutritious qualities, but there may be a difference in the mode in which it is cooked; in some cases it may retain most of its nutriment, and in others only a comparatively small part. It is claimed both by Wilson and by Marshall, that it retains all the juices and nutritious qualities of the meat, the compression only removing the superfluous moisture. I doubt whether that is exactly true, but I presume it does retain most of the nutritious qualities of the meat.

Wilson claims "the process described for packing cooked meats for transportation, by compressing the same into an air-tight package, so as to preserve the meat in its integrity and retain all the natural juices and nutritious qualities of the meat, substantially as set forth;" and then he claims "as

a new article of merchandise, cooked meat put up in a solid form in its natural state, without disintegration or desiccation, in hermetically sealed packages as set forth." It seems that there is an advantage in putting up meat in this way, which does not exist in other cases which have been brought to the attention of the court. The difficulty I have had, and still have, in the case is, whether this can be said to be of such a character as to entitle the parties to a patent.

The next point is as to the form of the can described in the patent of John A. Wilson, issued April 6, 1875; re-issued, Oct. 23, 1877. He claims an hermetically sealed can, used in packing meat or other articles, made in the shape of a pyramid, having rounded corners, and both ends slightly flaring to form shoulders, against which the head or end pieces rest. In other words, it is the shape of a can of cooked corned beef, put up by Libby, McNeill and Libby, and it is not material of what size it is made. "A.," he says, represents the body of the can made in the form of a truncated pyramid with rounded corners, and of any desired number of sides, although he prefers to make it of four sides; both ends of the body are made slightly flaring so as to form interior shoulders or offsets against which the heads "C." and "B." (top and bottom) rest. The edges of these heads are turned outward, as shown, and the flaring edge of the end of the can is turned over the flange, and the three thicknesses of metal pressed together by machinery, with or without solder, so as to make the joints air-tight. The meat is prepared, cut up, pressed and put in cans, pressed afterwards, and then the cans hermetically sealed. As I understand, the meat is put in at the large end. And then he claims the can for packing food, hermetically sealed, and constructed of pyramidal form and rounded corners, with offset ends to support the head, said head being secured as shown and described. He also claims, as an improved article of manu-

facture, solid meat, compressed as described, and within a pyramidal can, so that said can forms a mold for the meat, and permits its discharge in a solid cake substantially as specified.

It is conceded that there cannot be a patent for a mere form unless the form is of the essence of the invention. It is not easy to describe what constitutes the essence of the form so as to make it the subject of a patent, and distinguish it from that which is mere form. Sometimes, as the courts say, the form may be the substance of the invention, and there may be such a change produced in a certain article as to make it, (the article manufactured or otherwise, whatever it may be,) the subject of a patent. It seems that there are some advantages about the construction of the can which have made it come into common use. I have described the manner in which the meat is put up—that it becomes a compressed, compact mass, neither dry nor liquid; that it retains most of its nutritious qualities, and if freed from the pressure which surrounds it, it will retain its compact condition. The advantage of this can is, that when it is opened, as it usually is, at the bottom, and the bottom taken out, (the can having been previously cooled, so that the ice or the cool water may leave it in its least expansive condition,) and it is struck on the top, the meat falls out in a compact mass, and then can be eaten, or is fit for the table. Both of these are advantages, and the advantages have been such as have caused it, as the testimony shows, to come into great use, such that it has made what is claimed to be a revolution in the trade of preserved meat. And the patent office seems inclined to issue patents for such things which it calls a new article of manufacture, both as to the manner in which the meat is put up, and as to the structure of the can. And it has issued patents for both of these as a new article of manufacture.

But I must confess, on principle, I am not inclined to hold that these are the proper subject matter of a patent.

If we sustain a patent of this kind, I do not exactly see how we can do so without preventing everybody else from preparing and cooking meat, cutting it up and subjecting it to a pressure as these patentees describe. There seems nothing of invention in preparing and cutting up meat, or in putting it into a can, or in pressing it before or after it is put there, and there is certainly nothing new in hermetically sealing a can in the manner in which this is said to be sealed. There is nothing new in constructing a can of this particular form. It is a matter of fancy more or less. This can might be round or octagonal or in any other form, provided it was larger at the bottom than at the top—lessening gradually as it approached the top—and if the meat was in the same condition in which this was, and the can open at the bottom, the meat would fall out in the same way as from the plaintiff's can. If we sustain this patent, we prevent every one else from putting up meat in this form; that is, from cooking it, compressing it in the manner in which this is compressed, and putting it in cans, and hermetically sealing it. I do not feel like sustaining a patent, when such consequences are to follow.

And as to the plaintiff's can: There is nothing about this can, except the exercise, as I understand it, of mechanical skill. There is, certainly, nothing inventive in making it in this shape. I was at first inclined to think that there might be something in the peculiar form in which the can was put together, as in the rounded corners with both ends slightly flaring to form the shoulders, and the manner in which the end pieces are put on and secured, but I do not know that this is more than a mere mechanical device.

In stating my views about these patents, I may admit that there are some authorities which seem to sustain patents of

this kind, and that seems to some extent to be the usage of the patent office; but my own view is, that this is wrong, and that patents of this kind ought not to be sustained.

The case of the can of lard, unreported, *Tucker vs. Fairbanks*, is somewhat similar. I have always doubted whether I ought to have sustained that claim. My desire about this case is, that it should be arranged in such a way that the opinion of the Supreme Court can be taken on this question, whether or not these two things are patentable, namely: the manner in which the meat is prepared, compressed and placed in the can; and secondly, the manner in which the can is constructed.

It may be true that here is an article of merchandise which, in one sense, may be said to be new in the form in which it exists, and which, in consequence of its advantages, has come into common use.

It may be true that this is something like the caustic alkali case which has been so often referred to, but I must confess, personally, my strong opposition to the maintenance of patents of this kind as being against the rights of the public. For the court now to sustain these patents in this form is really giving them a complete monopoly of putting up compressed meats in this way, and in cans like these, and as the questions involved in this case are important, and as it may simplify matters, my brother judge and myself have concluded to certify the questions to the Supreme Court.

These patents were again brought before this court, at the December term, 1881, and decided invalid in the case of *Wilson Packing Co. vs. Chicago Packing and Provision Co.*, which will be published in a subsequent volume of this series. See also *Wilson Packing Co. vs. Clapp*, *ante*, page 154. [*Reporter.*

EDWARD STRONG vs. PHILIP GOLDMAN *et al.*

CIRCUIT COURT — NORTHERN DISTRICT OF ILLINOIS — JUNE, 1879.

IN EQUITY.

1. ASSIGNMENTS—ILLINOIS STATUTE—EQUITY JURISDICTION.—The Illinois statute of 1877 concerning assignments for the benefit of creditors and providing that the County Court shall have jurisdiction over assignees and the execution of the statute, does not deprive courts of equity of jurisdiction of a creditor's bill to set aside a fraudulent assignment, or preference consummated prior to the making of the assignment.

2. RECEIVER—FRAUD.—Where the debtor had made disposition of from $150,000 to $200,000 worth of stock without accounting for the proceeds, or paying his indebtedness, and then made an assignment under the state law, of about $18,000 worth of goods, it was *held* that this was a proper case for the appointment of a receiver, for the purpose of un-earthing if possible the disposition of the property.

This was a creditor's bill filed by complainant as judgment creditor of Philip Goldman. The bill alleged in substance the recovery of three judgments in this court against Goldman in favor of the complainant; that execution was issued, and returned no property found; that up to September 1, 1878, Goldman was engaged in the wholesale boot and shoe business in Chicago as manufacturer and dealer; that he had a large amount of merchandise in his possession, and claimed to be worth over eighty thousand dollars, over and above all his liabilities; that during the months of August and September he made very large purchases of goods, and had in his possession, as the result of these purchases, and of the stock previously obtained, something over $200,000 worth of goods; that sometime during the month of August

he commenced without the payment of debts to deplete his stock, and to dispose of his property, and continued to do so until some time in November last when he made an assignment to one Beiersdorf for the benefit of his creditors. The property thus assigned at that time amounted only to some $16,000 or $18,000, and the bill charged that in the course of about four months the debtor had disposed of and made way with something like $150,000 or $200,000 worth of goods, and left a very large amount of indebtedness uncancelled and unprovided for, and then made over to Beiersdorf, for the benefit of his creditors, this small remnant of his stock in trade. It was charged that the creditors did not know with any degree of certainty what disposition was made of it—whether he gave the goods away, secreted them, or made fraudulent sales—but it was charged generally that he had had dealings with sundry persons who were made parties defendant to the bill.

The defendant by his answer denied all fraud in the case, especially all specific allegations of fraud in the bill, and denied all fraudulent collusion or dealings with the defendants who were specially charged with having had fraudulent dealings with him. These defendants also denied that they had fraudulent dealings with Goldman. Goldman did not deny that he had this large amount of assets on hand at the time charged in the bill, nor that when he came to make his assignment in November he had no such amount of assets on hand. He did not state what he had done with them. He admitted the existence of the immense indebtedness, and a commercial indebtedness, contracted in the due course of business for goods purchased.

Tenney, Flower & Abercrombie, for complainant.

McClellan & Tewkesbury, for defendants.

BLODGETT, J.—The question is made, that inasmuch as the statute of Illinois passed in 1877,[1] regulating the method of executing assignments made for the benefit of creditors clothed the assignee with power to execute the trust under the direction of the County Court, after having given bond approved by the county judge, that a court of equity is from this time forward deprived of the power to exercise the ordinary jurisdiction, with which they have been heretofore clothed for entertaining creditors' bills and searching out fraudulent conveyances to set them aside, and that the whole subject-matter of investigating the affairs of a debtor who has seen fit to make an assignment is relegated to the County Court under the operation of this law. I cannot give any such scope to this statute regulating assignments. Undoubtedly the intention of the Illinois Legislature was as far as possible to give the aid of the County Court to the execution of assignments, but it nowhere clothes the voluntary assignee with power to set aside a fraudulent assignment which the assignor had made, or any other fraudulent acts. It does not give him authority to set aside a preference which had been made even upon the very eve of the assignment. It simply declares that any preference made in the assignment itself shall be void; but suppose that a debtor the very day that he makes his voluntary assignment to the assignee for the benefit of his creditors takes all his ready money and pays certain creditors in full, and then assigns the remnant of his estate for the benefit of his other creditors; there is no method by which the voluntary assignee can get behind his assignment—no method given by the statute by which he can get behind these preferences and set them aside, but he must simply step into the shoes of the debtor himself, and execute the assignment under the law without

[1] Illinois Revised Statutes. Hurd's edition—1877, chapter 10a.

the power to challenge or cause to be set aside any of the fraudulent transactions that the party may have been guilty of, up to the very moment he made his assignment. This is no question of conflict of jurisdiction between the County Court and this court; but it is a question whether the Legislature intended to clothe the County Court solely with power of administering the affairs of a debtor who has made a voluntary assignment so that creditors could not attack, except through the County Court and the assignee, a fraudulent assignment, or fraudulent actions and preferences consummated prior to the making of the assignment. I do not think there is any fair inference in the language of the law itself for any such intention on the part of the Legislature. It is not a question of conflict between the County Court of Cook County and the Federal Court of this circuit, but it is a question between the County Court and courts of equity, and in that light, it seems to me, the inference cannot be deduced that the Legislature intended to repeal a portion of the chancery act of this state, which has been in force over forty years, authorizing the filing of creditors' bills, and the pursuit through the agency and machinery of a court of equity of equitable assets and setting aside fraudulent conveyances. It did not intend to denude courts of the power they have so long exercised by the mere placing of voluntary assignees within the control of some tribunal which could overlook and control their transactions.

Then the question is, should this court appoint a receiver under the prayer in this bill, and the facts disclosed? As I have already said the complainants in this case ask that a receiver shall be appointed for the purpose of bringing suits and generally investigating the affairs of this debtor, and taking possession of any equitable assets which he may have. Inasmuch as the debtor himself, and the defendants who are charged in the bill with having had collusive or fraudulent

dealings, all deny that they ever had any fraudulent dealings such as ought to be set aside, or have in their possession any assets they ought to surrender, it is claimed there is no reason shown in that regard for the appointment of a receiver, and that a receiver should not be appointed until there is something for him to receive—some disclosure made of assets which he ought to have possession of. The answer is this: there is a disclosure, to some extent, that this man has by some method made way with a large amount of assets. The precise manner in which he has done it is not shown, nor perhaps known to the creditors. The complainant does not aver it in his bill any further than he avers fraudulent dealings and collusion with the parties made defendant. The fact that those parties deny that they have any assets they ought to surrender, does not necessarily involve the assumption that he has made no fraudulent disposition of his property. At most, it only involves the conclusion that the complainant has not yet discovered to whom this property has been conveyed. While it is true Goldman does emphatically deny that he has made any fraudulent disposition of property, at the same time the fact remains unchallenged that he has made disposition of an immense amount of his estate without accounting for the proceeds of it, and has left much of his indebtedness unpaid. On this showing, it seems to me, there is a case made for the appointment of a receiver to be clothed with powers, competent for the court to confer, for the purpose of bringing suits, or prosecuting this suit, and unearthing, if it is possible, the disposition this man has made of this property. A receiver will, therefore, be appointed with such powers as the court may now or hereafter confer upon him in the premises.

INDEX.

ABANDONMENT OF HOMESTEAD—*See* EXEMPTIONS, 5.
ACCIDENT INSURANCE—*See* INSURANCE.
ACKNOWLEDGMENT—*See* CONVEYANCES.
ACTION, FORM OF—*See* PRACTICE, 8.
ADMINISTRATION OF ESTATES.

1. CONTINGENT CLAIMS NOT BARRED BY TWO YEARS' LIMITATION STATUTE.—A contingent claim which is not due, or which had not accrued prior to the close of the administration of an estate, is not barred by the Illinois statutory two years' limitation of time within which to exhibit claims against a decedent's estate. *Payson vs. Hadduck*, 293.
2. LIABILITY OF HEIR FOR ANCESTOR'S LIABILITIES.—The heir is liable to the extent both of the personal and the real estate received from his ancestor, for the contracts or liabilities of the ancestor, and where these claims have not accrued until after the administration of the estate is closed, suit may be brought and maintained against the heir, to the extent of the assets derived from the ancestor. *Id.*
3. EQUITY JURISDICTION—CAPITAL STOCK ASSESSMENT.—Where the ancestor holding capital stock in a corporation, subject to assessment, died, and subsequent to the close of administration of the estate, an assessment was made upon the stock: *Held*, That a suit in equity could be maintained against the heirs for such assessment to the extent of assets received from the ancestor. *Id.*

ADMIRALTY.

1. BILL OF LADING—ESTOPPEL.—If a master of a vessel signs bills of lading before the goods are on board, and afterwards they are placed on board as and for the goods embraced in the bills of lading, the bills operate on the goods as against the shipper and master, by way of relation and estoppel *The Farwell*, 61.
2. BILLS OF LADING ISSUED BEFORE GOODS DELIVERED—EFFECT OF SUBSEQUENT DELIVERY—POWER OF MASTER. *Id.*
3. LIEN—SUBROGATION.—A vessel, while in a foreign port, was seized for supplies furnished. The libellant in this case, at the request

ADMIRALTY—*Continued.*

of the owner, signed the usual stipulation for the release of the vessel, and afterwards paid the amount which was decreed against the vessel: *Held*, that by signing such stipulation and paying such decree he did not become subrogated to the rights of the former libellant so as to acquire a lien upon the vessel, and that the libel could not be maintained. *The Robertson*, 180.

4. A distinction exists between an actual advancement of money to clear off a lien, with a resulting hypothecation of the ship to the person making such advancement, and the act of joining with the principal debtor in an obligation to pay at a future time upon certain contingencies. *Id.*

ADVERSE POSSESSION.

1. STATUTE OF LIMITATIONS—REAL ESTATE.—In order to acquire a valid title to land by virtue of the Statute of Limitations, there must have been an open, adverse, and continuous possession for twenty years, under a claim of title to the property. *Sacket vs. McDonnell*, 394.

2. SQUATTER CLAIMS.—A squatter on land cannot avail himself of his occupancy, unless he has denied or impugned the title of the real owner. Mere permissive occupancy will not suffice. *Id.*

AGENT—*See* PRINCIPAL AND AGENT.

AGENT'S BOND—*See* BONDS.

AMENDMENTS—*See* PRACTICE.

APPEAL BOND—*See* PRACTICE, 27.

ASSESSMENTS—*See* REVENUE LAW.

ASSIGNEE IN BANKRUPTCY—*See* BANKRUPTCY—PRACTICE, 25—MORTGAGES, 4–5.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

ILLINOIS STATUTE—EQUITY JURISDICTION.—The Illinois statute of 1877, concerning assignments for the benefit of creditors and providing that the County Court shall have jurisdiction over assignees and the execution of the statute, does not deprive courts of equity of jurisdiction of a creditor's bill to set aside a fraudulent assignment, or preference consummated prior to the making of the assignment. *Strong vs. Goldman*, 552.

ASSIGNMENT IN FRAUD OF CREDITORS—*See* BANKRUPTCY, 8.

ATTACHMENT—*See* PRACTICE, 31–32.

ATTORNEY AND CLIENT.

POWER OF ATTORNEY TO COMPROMISE—SATISFACTION OF JUDGMENT—WHEN SET ASIDE.—An attorney was employed to bring suit and collect the amount due. After obtaining judgment against the defendant, the attorney compromised with the defendant and accepted less than the full amount—and entered the judgment fully satisfied. The attorney failed to turn over the amount received: *Held*, that plaintiffs were entitled to have the satisfaction set aside,

ATTORNEY AND CLIENT—*Continued.*
on condition that they would indorse on the judgment the amount received by the attorney. *Pierce vs. Brown*, 534.
BANKRUPTCY—*See* PARTNERSHIP.
1. VOLUNTARY ASSIGNMENT AN ACT OF BANKRUPTCY.—The making of a voluntary general assignment by a debtor is an act of bankruptcy of itself and must be presumed to have been made in contemplation of bankruptcy. *In re Croft Bros.*, 188.
2. INDIVIDUAL EXEMPTIONS FROM PARTNERSHIP ASSETS.—Partnership assets are a trust fund for the payment of the creditors of the firm, and no exemptions can be set apart from them to the individual partners, until all the partnership debts are paid. *Id.*
3. ASSIGNMENT IN FRAUD OF CREDITORS—DISCHARGE IN BANKRUPTCY.—Where prior to the filing of a voluntary petition in bankruptcy, the partners made a general assignment of all their assets, and the assignee set apart a portion of these as exemptions to one of the partners, it was *held*, that the assignment was made for the purpose of preventing some portion of the assets of the firm being distributed to satisfy firm debts, and: *Held, further*, that the court under such circumstances would not grant a discharge. *Id.*
4. FILE MARKS NOT CONCLUSIVE.—A petition in bankruptcy was marked as filed at "12 o'clock." An execution against the bankrupts' property was also marked as filed with the sheriff at "12 o'clock," the same date: *Held*, That the file-marks were not conclusive, and that it was competent to establish the priority of the execution lien by showing by parol testimony, that in fact the petition was not filed until 1 o'clock. *In re Alonzo Roberts*, 426.
5. AMENDMENT TO PETITION—EFFECT BY RELATION.—Amendments to a petition in bankruptcy relate back to the time of the filing of the original petition, and have the same force and effect as though included in the petition itself. *Sherman vs. International Bank*, 371.
6. WHEN ASSETS VEST IN ASSIGNEE.—Where a party was adjudicated a bankrupt solely on the acts of bankruptcy stated in an amendment to the petition filed against him; and prior to the filing of the amendment, but subsequent to the filing of the original petition, he had disposed of certain securities: *Held*, that the assignment to the assignee related back to the filing of the petition, and had effect from that date to transfer all assets of the bankrupt to the assignee, and that the bankrupt had no power to make any transfer of such securities, and that no title passed by his transfer and delivery. *Id.*
7. ASSETS—INTEREST IN SPECULATIVE OPERATIONS.—The bankrupt and certain other parties made a contract by which a speculation in real estate was arranged, the bankrupt to have a certain per cent. interest and a division of the profits: *Held*, that the bankrupt

BANKRUPTCY—*Continued.*

had such an interest in the assets, which grew out of the real estate operations, as would pass to the assignee. *Id.*

8. It was not the case of a partnership where all the partnership property vested in the other partners. *Id.*

9. EXEMPTIONS IN WISCONSIN—PARTNERSHIP STOCK.—Where there has been an adjudication in bankruptcy against a mercantile partnership and the assets of the firm turned over to the assignee, the individual partners are not entitled to claim as exempt, under the statute of Wisconsin, the sum of two hundred dollars each, out of the partnership stock. *In re Hughes*, 107.

10. BANKRUPTCY—ESTATE IN ENTIRETY—DIVORCE.—Real estate was conveyed to A. and B., husband and wife, to be held in entirety. A. subsequently went into bankruptcy, and between the date of the adjudication and his discharge B. obtained a divorce. The assignee in bankruptcy of A. claimed one-half interest in the land as the property of A. *In re Benson*, 116.

11. *Held*, that in Indiana the common law rule as to tenants by entirety has not been changed, except that the husband, under the statutes of that state, does not acquire any legal interest or estate in the lands of the wife.

12. *Held*, that when the adjudication in bankruptcy was made, A. had no interest in the real estate which passed to his assignee, and that if he gained an alienable interest by the divorce, it was a new acquisition subsequent to the adjudication, which cannot be claimed by the assignee. *Id.*

13. USURIOUS INTEREST—RIGHT OF ASSIGNEE TO SUE FOR.—An assignee in bankruptcy is the "legal representative" of the borrower within the meaning of the 30th Section of the National Banking Act, and as such can maintain an action to recover back usurious interest paid, as provided for by said act. *Wright vs. First National Bank*, 243.

14. The right of action given by said section is a "claim" or "debt" which passes to the assignee. *Id.*

15. Though such action is to recover a penalty, it is distinguishable from actions for damages growing out of mere torts to the bankrupt's person. *Id.*

16. A MORTGAGE TO SECURE FUTURE ADVANCES, is good as against the assignee in bankruptcy for the amount of advances actually made thereon. *Schulze vs. Bolting*, 174.

17. A MISTAKE IN THE DESCRIPTION of the premises in such mortgage may be corrected as against the assignee to the same extent as would have been allowed against the mortgagor. *Id.*

18. PROOF OF JOINT DEBT—INDIVIDUAL SECURITY.—In a proceeding in bankruptcy, a creditor of the firm, holding security upon the separate property of one of the partners, may prove his entire claim

BANKRUPTCY—*Continued.*

against the joint estate without releasing his security, though the member whose individual estate constitutes the security, owes no individual debts. *In re Thomas & Sivyer*, 189.

19. SALE BY LIEN-HOLDER.—Where one has a valid lien upon property in his custody belonging to another who is on the eve of bankruptcy, and sells the same with the knowledge that bankruptcy is imminent, the sale will not be afterwards disturbed by the court in bankruptcy if untainted by fraud, and if there has been no sacrifice of the property. *In re Roseberry*, 112.

20. FACTOR'S LIEN PROTECTED.—The lien of a factor for his advancements, charges and commissions, is within the meaning of the amendment to Section 5,128, Revised Statutes of the United States, which provides that nothing in that section shall be construed to invalidate securities taken in good faith upon the making of a loan, and will be protected in bankruptcy. *Id.*

21. CORPORATION—BANKRUPTCY OF STOCKHOLDER AND OFFICER.—The individual bankruptcy of a person, who is a stockholder in, and a director and officer of, a corporation which is not in bankruptcy, does not incapacitate him from exercising his functions as such officer of the corporation, nor render inoperative and void as to third parties the acts and conveyances of the corporation done and executed through him as its representative. *Atlas Nat. Bank vs. F. B. Gardner Co.*, 537.

22. COMPOSITION WITH CREDITORS — VOLUNTARY PAYMENTS.—Where a creditor accepted a failing debtor's offer of compromise, but with a proviso that no other creditor should receive better terms; and the debtor afterwards voluntarily paid some of his other creditors in full: *Held*, that this did not vitiate the settlement. *In re Sturges*, 79.

23. FRAUDULENT COMPOSITION.—Where the debts against a partnership have been compromised and the firm dissolved, one of the partners has no right afterwards to put the firm into bankruptcy upon allegations of his own fraud in effecting the composition. *In re Hamlin, Hale & Co.*, 122.

24. WHO MAY AVOID.—A composition with creditors fair upon its face, but in fact fraudulent as to part of them, can be set aside only by the creditors who are wronged. The debtor cannot be heard to assert his own fraud as a reason for setting aside such settlement. *Id.*

25. VEXATIOUS PROCEEDINGS—RIGHT TO DISMISS.—Where it appears that a petition in bankruptcy has been filed by one member of a firm solely for the purpose of vexing and harrassing the other partner, the court has power to dismiss the proceedings. *Id.*

26. PREFERENCE TO CREDITOR—WHEN MUST BE SET ASIDE.—A preference to a creditor cannot be set aside unless an adjudication in

BANKRUPTCY—*Continued.*

bankruptcy is had within the time limited by the Bankrupt Act. *Id.*

27. STATUTE OF LIMITATIONS.—The rule of the Illinois Statute of Limitations that the limitation does not begin to run till the fraud is discovered has no application to such case. *Id.*

BANKS—*See* NATIONAL BANKS.

BILL OF LADING—*See* ADMIRALTY, 1, 2.

BILLS—*See* NOTES, BILLS AND CHECKS.

BLANK—*See* BONDS, 1, 2.

BONDS—*See* REVENUE LAW, 6, 9—MUNICIPAL BONDS.

1. AGENT'S BOND—EXECUTION IN BLANK.—The fact that a bond was executed in blank by the surety and afterwards filled up by his principal, does not alter the liability of the surety, where this irregularity is not brought home to the knowledge of the obligee. *Mutual Life Ins. Co. vs. Wilcox*, 197.

2. EFFECT OF BLANK.—An agent's bond is not invalidated by being left blank in regard to the place of the agency. *Id.*

3. LIABILITY OF SURETY.—If an agent gives a trust deed to secure payment of a defalcation, the cancellation of the deed upon subsequent payment in full of that defalcation, would not affect the agent's surety on a subsequent bond. *Id.*

4. LIABILITY FOR PRIOR DEFALCATIONS.—If the agent at the time of the signing of the bond had moneys in his hands which he ought to have reported as collected but had not—they would come within the condition of the bond. *Id.*

5. FRAUD—KNOWLEDGE.—In order for the surety to escape liability on the ground of existing irregularities and defalcations of the agent, it must be shown that these were known to the latter's principal. *Id.*

BOARD OF TRADE CONTRACTS—*See* CONTRACTS, 5, 6.

BURDEN OF PROOF—*See* INSURANCE, 4—EVIDENCE—REVENUE LAW, 22.

CHANCERY—*See* NAVIGATION OF RIVERS, 2, 3.

1. CAPITAL STOCK ASSESSMENT.—Where the ancestor holding capital stock in a corporation, subject to assessment, died, and subsequent to the close of administration of the estate, an assessment was made upon the stock: *Held*, That a suit in equity could be maintained against the heirs for such assessment to the extent of assets received from the ancestor. *Payson vs. Haddock*, 293.

2. PERSONAL PROPERTY—LEVY AND SALE—INJUNCTION.—A mortgagee of ordinary chattels, in possession under his mortgage, is not entitled to an injunction against the marshal, restraining him from levying upon and selling such chattels, under an execution against the mortgagor. *La Mothe vs. Fink*, 498.

CHANCERY—*Continued.*

3. EQUITY JURISDICTION.—The mortgagee has an adequate remedy at law, and equity should not interfere. *Id.*
4. ADEQUATE REMEDY AT LAW does not mean ability to resort to every form of legal procedure. If any form of action at law will give such remedy, equity will not interfere. *Id.*
5. Discussion of jurisdiction of Chancery over articles of personal property; and many cases cited and distinguished. *Id.*
6. ASSIGNMENTS—ILLINOIS STATUTE—EQUITY JURISDICTION.—The Illinois statute of 1877, concerning assignments for the benefit of creditors and providing that the County Court shall have jurisdiction over assignees and the execution of the statute, does not deprive courts of equity of jurisdiction of a creditor's bill to set aside a fraudulent assignment, or preference consummated prior to the making of the assignment. *Strong vs. Goldman*, 552.

CHATTEL MORTGAGES.

1. POSSESSION—FRAUD.—In Indiana a mortgage of a stock of goods, with a parol agreement that the mortgagor should have possession and sell them in the usual course of his retail business, and apply the proceeds of the sale to the payment of the mortgage debt, is not fraudulent and void as against creditors of the mortgagor. *Overman vs. Quick*, 134.
2. AGENCY.—The mortgagor is, in effect, the mortgagee's agent for the sale of the goods. *Id.*
3. LEVY AND SALE—INJUNCTION.—A mortgagee of ordinary chattels, in possession under his mortgage, is not entitled to an injunction against the marshal, restraining him from levying upon and selling such chattels, under an execution against the mortgagor. *La Mothe vs. Fink*, 493.
4. EQUITY JURISDICTION.—The mortgagee has an adequate remedy at law, and equity should not interfere. *Id.*

CHECKS—*See* NOTES, BILLS AND CHECKS.

CLASSIFICATION OF RAILROAD INDEBTEDNESS—*See* RAILROADS, 20.

COMMISSIONS—*See* INTEREST, 3—CORPORATIONS, 8.

COMPOSITION—*See* BANKRUPTCY, 22, 23.

CONFLICT OF JURISDICTION.

The Supreme Court of Illinois having decided that the Legislature cannot by subsequent legislation, render valid a vote by a town to subscribe to railroad stock, if there was no law in force at the time of the subscription authorizing it, the Federal Court will follow that authority although in conflict with a prior decision of the United States Supreme Court. *Leslie vs. Town of Urbana*, 435.

CONSTITUTIONAL LAW—*See* TRADE MARKS, 2, 3—NAVIGATION OF RIVERS—EXEMPTIONS, 7.

CONSTRUCTION OF CONTRACTS.

1. DECLARING NOTE DUE UNDER CLAUSE IN TRUST DEED.—Where a clause in a trust deed provided that the indebtedness secured thereby was to become wholly due and payable in case of default in the payment of interest, the note and trust deed, being contemporaneous instruments, must be construed together, and if default is made in payment of interest, the whole indebtedness becomes due, and the holder of the note may pursue the maker of the note by a personal judgment after exhausting the securities. *Gregory vs. Marks*, 44.
2. Contracts, when their meaning is not clear, are to be construed in the light of the circumstances surrounding the parties when they were made, and the practical interpretation which they by their conduct have given to the provisions in controversy. *P. C. & St. L. R'y Co. vs. C. C. & I. C. R'y Co.*, 457.

CONSTRUCTION OF STATUTES—*See* CONTRACTS, 5.

CONTRACTS—*See* CONSTRUCTION OF—RAILROADS, 22.

1. EXECUTORY—NOTICE OF RENUNCIATION—PREMATURE SUIT.—Where one makes a contract to be performed in the future, and before the time for performance has arrived, notifies the other party that he will not comply with its terms, this may be treated as an immediate breach of the contract, and suit commenced before the time for performance has arrived is not prematurely brought. *Grau vs. McVicker*, 13.
2. BREACH OF CONTRACT.—A declaration that a party will not perform an act in the future, may be treated as a breach of a promise to perform such act. *Id.*
3. SAME—SET-OFF.—A. agreed to rent B.'s theater for two weeks from the 9th of February. On the 9th of January he informed B. of his intention not to take or occupy the theater according to agreement: *Held*, that B. might treat this notice as a breach of the contract, and that the amount of the rental under the contract would be a valid set-off in an action commenced by A. against B. on the 13th of January. *Id.*
4. MEASURE OF DAMAGES.—*It seems*, that where a contract is broken, by a notice of renunciation, prior to the time for its performance, the damages are such as would have arisen from the non-performance of the contract at the appointed time, subject to abatement in respect to any circumstances that may afford the means of mitigating the loss. *Id.*
5. TIME CONTRACTS—STATUTE CONSTRUED.—The Illinois Statute (Rev. Stat., Chap. 38, Sec. 130,) was not intended to prohibit sales of grain or other commodities for future delivery where the seller reserves to himself a simple option as to the time of delivery within certain limits. *Gilbert vs. Gaugar*, 214.
6. ADJUSTING DIFFERENCES—LIABILITY OF CUSTOMER TO BROKER.—If

CONTRACTS—*Continued.*

one makes a contract to deliver grain during a future month at a fixed price, and by reason of the adverse aspect of the market, directs his brokers to settle with the purchasers before the maturity of the contract, this does not make the contract void as a gambling transaction, and he is liable for the differences paid by the brokers in his behalf as well as for their commissions. *Id.*

CONSPIRACY—*See* INDICTMENTS.

CONVEYANCES—*See* MORTGAGES—BANKRUPTCY, 10.

FEMMES COVERT—ACKNOWLEDGMENT OF DEED—ILLINOIS ACT OF 1869.—In Illinois, under the act of 1869, it is not necessary that a *femme covert* should acknowledge her deed in order to render it valid. *Hawes vs. Mann*, 21.

CORPORATION—*See* PRACTICE—NOTES, BILLS AND CHECKS, 4.

1. FRAUD OF DIRECTORS — RIGHT OF STOCKHOLDERS TO BE MADE PARTIES TO SUIT.—Where any fraud has been perpetrated by the directors of a company, by which the property or interest of the stockholders is affected, the stockholders have a right to come in as parties to a suit against the company and ask that their property shall be relieved from the effect of such fraud. *Bayliss vs. L., M. & B. R'y Co.*, 198.
2. ULTRA VIRES—DEFENSE TO NOTE—LOANS.—Where the charter of a company provides that its surplus funds shall be invested in mortgages on real estate in New York, or in certain classes of bonds, it is not competent for one who in another state has obtained a loan on personal security, nor his surety, to set up in defense the want of power in the company to make the loan. *Mutual Life Ins. Co. vs. Wilcox*, 203.
3. CREDIT FOR COMMISSIONS, claimed by an insurance agent from the company cannot be allowed a guarantor of the agent's note in a suit at law; such claim could only be made available in a suit in equity on an accounting. *Id.*
4. FOREIGN INSURANCE COMPANY—INVESTMENT—PUBLIC POLICY.—Insurance companies created by the laws of other states do not contravene the public policy of Illinois by investing their assets in mortgages upon real estate within that state. *Hards vs. Conn. Mutual Life Ins. Co.*, 284.
5. CORPORATION—BANKRUPTCY OF STOCKHOLDER AND OFFICER.—The individual bankruptcy of a person, who is a stockholder in, and a director and officer of, a corporation which is not in bankruptcy, does not incapacitate him from exercising his functions as such officer of the corporation nor render inoperative and void as to third parties the acts and conveyances of the corporation done and executed through him as its representative. *Atlas Nat. Bank vs. F. B. Gardner Co.*, 587.
6. OFFICER DE FACTO OF CORPORATION—POWER TO ACT.—Where by

CORPORATION—*Continued.*

the law under which a corporation was created, it was required that the directors and officers should be stockholders and be elected for one year, and the president became bankrupt and subsequently acted as the president of the corporation: *Held*, that notwithstanding his bankruptcy, he was the president *de facto* of the corporation, and as such his acts were, in the absence of fraud, the acts of the corporation. *Id.*

COUNSEL'S SIGNATURE—*See* PRACTICE, 11.

CRIMINAL LAW—*See* REVENUE LAW—INDICTMENTS.

DAMAGES—*See* MEASURE OF DAMAGES.

DEBTOR AND CREDITOR.

COMPOSITION WITH CREDITORS—VOLUNTARY PAYMENTS.—Where a creditor accepted a failing debtor's offer of compromise, but with a proviso that no other creditor should receive better terms; and the debtor afterwards voluntarily paid some of his other creditors in full: *Held*, that this did not vitiate the settlement. *In re Sturges*, 79.

DECREES, AMENDMENTS TO—*See* PRACTICE, 17, 18.

DEEDS—*See* CONVEYANCES.

DEFICIENCY DECREE—*See* MORTGAGES, 10.

DIRECTORS—*See* CORPORATIONS.

DISCHARGE—*See* BANKRUPTCY, 8.

DOMICILE.

OF CORPORATION.—A corporation, being the creature of local law, dwells only within the territorial boundaries of the sovereign or state which creates it, and it cannot be an inhabitant of another state. *Hume vs. P. C. & St. L. R. R. Co.*, 31.

DONATIO CAUSA MORTIS.

1. DONATIO CAUSA MORTIS—DELIVERY.—*Donatio causa mortis* must be of personal property or *choses* in action, actually delivered by the donor to the donee, in apprehension of approaching death from an existing disorder, or other impending peril, and from which death must ensue without any complete intermission. *Hassel vs. Basket*, 303.

2. TITLE.—The gift must vest in the donee a present title, though it is defeasible until the death of the donor. *Id.*

3. CERTIFICATE OF DEPOSIT—INDORSEMENT.—The deceased, the donor, indorsed a certificate of deposit to the defendant, but the indorsement was of such a character as to absolutely prohibit the latter from claiming any present title to the money, or any right to demand payment until after the death of the donor: *Held*, not to be a *donatio causa mortis*. *Id.*

EQUITY—*See* CHANCERY.

EQUITY JURISDICTION—*See* NAVIGATION OF RIVERS—ADMINISTRATION OF ESTATES—CHANCERY, 2, 3.

ESTATES—*See* ADMINISTRATION OF—BANKRUPTCY, 10-12.
ESTOPPEL—*See* ADMIRALTY, 1.—MUNICIPAL BONDS, 5.
EVICTION—*See* RAILROADS, 18.
EVIDENCE—*See* INSURANCE, 3, 4.—REVENUE LAW, 22.—INDICTMENTS.
1. EXPERT TESTIMONY—COMPENSATION.—The fact that an expert requires payment for his opinions as such, should not discredit him before the jury, as he is not bound to come into court and testify for ordinary witness fees. *Harvey vs. E. C. & M. S. Packet Co.*, 99.
2. LOST AND UNRECORDED DEED.—If proven by parol, the evidence must be clear and convincing. *Sacket vs. McDonnell*, 394.
EXECUTIONS—*See* PRACTICE, 12.
EXEMPTION—*See* PARTNERSHIP, 2.
1. IN WISCONSIN—PARTNERSHIP STOCK.—Where there has been an adjudication in bankruptcy against a mercantile partnership and the assets of the firm turned over to the assignee, the individual partners are not entitled to claim as exempt, under the statute of Wisconsin, the sum of two hundred dollars each out of the partnership stock. *In re Hughes*, 107.
2. INDIVIDUAL EXEMPTIONS FROM PARTNERSHIP ASSETS.—Partnership assets are a trust fund for the payment of the creditors of the firm, and no exemptions can be set apart from them to the individual partners, until all the partnership debts are paid. *In re Croft Bros.*, 188.
3. SALE OF HOMESTEAD UNDER EXECUTION.—In Illinois the sale of property, while occupied as a homestead, by virtue of an execution and levy is void, and it makes no difference whether the premises are worth more or less than the $1,000 allowed as the limit in value of the homestead. *Kerr vs. South Park Com'rs*, 276.
4. EXTENT OF HOMESTEAD—LOT.—But in giving construction to the term "lot" as used in the homestead law, the court will confine it to the forty acre tract, according to governmental survey, upon which the residence of the debtor is situated; though if the sheriff sells as one tract two forty acre pieces of land, one of which is the homestead, the sale will be set aside as to the entire eighty acres. *Id.*
5. ABANDONMENT OF HOMESTEAD—WIFE'S INTENTIONS AND DECLARATIONS.—In determining whether there has been an abandonment of the homestead, regard must be had as well to the purposes and declarations of the wife, as of the husband, and where there is an intention or desire on the part of the wife to return, the right of homestead may not be lost, even though the husband did not intend to return. *Id.*
6. HOMESTEAD—GOOD AGAINST GOVERNMENT.—In final process on a judgment in a suit upon a bond given to relieve property from seizure for violation of the revenue law, the homesteads of the sureties upon such bond in Wisconsin, are exempt. The action and judgment upon the bond must be considered as a civil proceeding. *Salentine vs. Fink*, 503.

EXEMPTION—*Continued.*

7. POWER OF CONGRESS TO PASS EXEMPTION LAWS.—It is competent for Congress to pass laws declaring whether there shall be an exemption or not, but there having been no legislation upon that subject, it may fairly be inferred that it was intended to leave the question to the legislation of the states respectively. *Id.*

8. Where there is no language in the exemption law indicating whether or not such exemption is to apply to the Government, it will be construed as applying as well to the state as to the individual. *Id.*

9. HOMESTEAD EXEMPTION.—Congress not having legislated upon the subject, a writ in favor of the United States in a civil case cannot be levied upon a homestead exempt by the state law from levy under process of the state courts. *It seems:* that if Congress chooses to legislate on the subject, the United States courts would not be bound by state exemption laws. *Id.*

EXPERT TESTIMONY—*See* EVIDENCE.

FACTOR'S LIEN—*See* BANKRUPTCY, 20.

FEDERAL JURISDICTION—*See* PRACTICE—CHANCERY

FILE MARKS—*See* BANKRUPTCY, 4.

FORECLOSURE—*See* MORTGAGES—RAILROADS.

FOREIGN CORPORATIONS—*See* MORTGAGES, 8—PRACTICE, 2-7.

FUTURE ADVANCES—*See* MORTGAGES, 4.

GAMING CONTRACTS—*See* CONTRACTS, 5, 6.

GIFTS—*See* DONATIO CAUSA MORTIS.

HEIR, LIABILITY OF—*See* ADMINISTRATION OF ESTATES, 2.

HOMESTEAD—*See* PARTNERSHIP, 2—EXEMPTIONS, 8-9.

HUSBAND AND WIFE.

CONVEYANCES—FEMMES COVERT—ACKNOWLEDGMENT OF DEED—ILLINOIS ACT OF 1869.—In Illinois, under the Act of 1869, it is not necessary that a *femme covert* should acknowledge her deed in order to render it valid. *Hawes vs. Mann*, 21.

INDICTMENT.

1. JOINT INDICTMENT.—Where two or more persons are jointly indicted for the commission of one and the same offense, to convict all, it must appear that the offense wholly arose from the joint act of all. *United States vs. McDonald*, 439.

2. PROOF OF SEPARATE ACTS.—Such an indictment is not sustained by proof merely that each of the defendants separately committed at different times a separate and distinct offense of the character charged, with which the other defendants were not connected, and in which they did not participate. *Id.*

INDORSEMENT—*See* DONATIO CAUSA MORTIS—NOTES, BILLS AND CHECKS, 5.

INDORSER—*See* NOTES, BILLS AND CHECKS, 8.

INFRINGEMENT—*See* PATENTS.

INJUNCTION—*See* CHANCERY, 2–5.
INSURANCE.
1. ACCIDENT INSURANCE POLICY—TERM "ACCIDENTAL" CONSTRUED. *McCarthy vs. Travelers' Ins. Co.*, 362.
2. PROXIMATE AND REMOTE CAUSE DEFINED. *Id.*
3. Testimony showing the health of the insured from infancy to his last sickness is admissible. *Id.*
4. BURDEN OF PROOF.—In such case the burden of proving that the death was the result of disease is upon the party alleging it. *Id.*
INTEREST.
1. USURY—NATIONAL BANKS—RENEWAL OF NOTES.—Where a national bank discounts a note, reserving a usurious rate of interest, and the borrower gives a new note in renewal at legal interest, the bank is entitled to recover the amount of the renewal note, with interest, less the amount of the usury reserved on the original discount, credited as of that date. *National Bank of Madison vs. Davis*, 100.
2. STATUTE OF LIMITATIONS.—Usury, paid more than two years before the commencement of the suit, cannot be recovered nor credited upon the principal of the note. *Id.*
3. LOAN OF MONEY—COMMISSION—USURY.—The fact that the borrower of money pays commissions to the loan broker in addition to the lawful rate of interest to be paid the lender, does not make the contract of lending usurious, unless it appears that the claim for commissions was but a device to evade the usury laws. *Eddy vs. Badger*, 238.
4. USURIOUS INTEREST—RIGHT OF ASSIGNEE TO SUE FOR.—An assignee in bankruptcy is the "legal representative" of the borrower within the meaning of the 30th Section of the National Banking Act and as such can maintain an action to recover back usurious interest paid, as provided for by said act. *Wright vs. First Nat. Bank*, 243.
5. The right of action given by said section is a "claim" or "debt" which passes to the assignee. *Id.*
6. Though such action is to recover a penalty, it is distinguishable from actions for damages growing out of mere torts to the bankrupt's person. *Id.*
7. APPEAL BOND TO COVER INTEREST.—Where a party by appealing ties up a fund in court, the bond should provide for payment of interest during the pendency of the appeal. *Turner vs. I., B. & W. R'y Co.*, 527.
INTERNAL REVENUE—*See* REVENUE LAW.
JUDGMENTS—*See* RAILROADS, 7—PRACTICE, 28.
JUDICIAL SALE—*See* PRACTICE, 19–24.
REDEMPTION—DRAFT ACCEPTED AS MONEY.—If the amount necessary to redeem from a sheriff's sale is paid to the proper officer in a bank draft, which is accepted by the officer but not actually col

JUDICIAL SALE—*Continued.*

lected until after the expiration of the time for redemption, the redemption is nevertheless complete. It is not essential that the payment be made in currency unless so required by the officer. *Buford vs. Henzier*, 177.

JURISDICTION—*See* CHANCERY—EQUITY JURISDICTION—PRACTICE.

LAND GRANTS—*See* RAILROADS, 10–12.

LEASES—*See* RAILROADS, 13–24—PRINCIPAL AND AGENT, 1.

LEVY—*See* CHANCERY—PRACTICE.

LIBEL—*See* SLANDER AND LIBEL.

LIENS—*See* BANKRUPTCY, 19, 20—REVENUE LAW.

LIMITATIONS—*See* INTEREST, 2—BANKRUPTCY, 27.

1. ADMINISTRATION OF ESTATES—CONTINGENT CLAIMS NOT BARRED BY TWO YEARS' LIMITATION STATUTE.—A contingent claim which is not due, or which had not accrued prior to the close of the administration of an estate, is not barred by the Illinois statutory two years' limitation of time within which to exhibit claims against a decedent's estate. *Payson vs. Hadduck*, 293.
2. REAL ESTATE.—In order to acquire a valid title to land by virtue of the Statute of Limitations, there must have been an open, adverse, and continuous possession for twenty years, under a claim of title to the property. *Sacket vs. McDonnell*, 394.

LIS PENDENS—*See* MORTGAGES, 9.

The pendency of a suit is not constructive notice to purchasers of negotiable paper, which is the subject of the suit. *Preble vs. Board of Supervisors*, 358.

MARRIED WOMEN—*See* HUSBAND AND WIFE.

MASTER'S SALE—*See* PRACTICE, 19–24.

MEASURE OF DAMAGES.

1. BREACH OF CONTRACT.—*It seems*, that where a contract is broken, by a notice of renunciation, prior to the time for its performance, the damages are such as would have arisen from the non-performance of the contract at the appointed time, subject to abatement in respect to any circumstances that may afford the means of mitigating the loss. *Grau vs. McVicker*, 18.
2. TELEGRAPH DISPATCH.—Where the face of a dispatch does not indicate that the sender is liable to sustain loss if the dispatch is not promptly forwarded, and the company is not so informed, it is liable only for nominal damages. *Behm vs. Western Union Telegraph Co.*, 131.

MECHANIC'S LIEN.

LIS PENDENS.—After bill of foreclosure filed by mortgagee, it is not within the power of the mortgagor pending the suit, by contract with a mechanic without the consent of the mortgagee, to create an incumbrance upon the property which can in anywise affect

MECHANIC'S LIEN—*Continued.*
the rights of the mortgagee, as they may be declared by final decree. *Hards vs. Conn. Mutual Life Ins. Co.*, 234.
MISCONDUCT OF JURY—*See* PRACTICE, 26.
MISTAKE—*See* MORTGAGES, 5.
MORTGAGES—*See* RAILROADS—NOTES, BILLS AND CHECKS, 4, 5.
1. DECLARING NOTE DUE UNDER CLAUSE IN TRUST DEED.—Where a clause in a trust deed provided that the indebtedness secured thereby was to become wholly due and payable in case of default in the payment of interest, the note and trust deed, being contemporaneous instruments, must be construed together, and if default is made in payment of interest, the whole indebtedness becomes due, and the holder of the note may pursue the maker of the note by a personal judgment after exhausting the securities. *Gregory vs. Marks*, 44.
2. MORTGAGES—TRUSTEES—NEGOTIABLE PAPER—EQUITIES BETWEEN PRIOR PLEDGEE AND SUBSEQUENT LIENORS—CONSTRUCTIVE NOTICE OF RECORD—DUE DILIGENCE.—Where A., a trustee under a deed of trust upon real estate to secure a promissory note, was entrusted with the note for collection, the holder indorsing it in blank, and he fraudulently pledged the note before maturity, indorsing it in blank, for a debt of his own to B., who acted in good faith; and subsequently, through *mesne* conveyances of record which recited the deed of trust, A. took title to the property, assuming the debt secured by the deed of trust, and afterwards obtained loans on the faith of his title, representing the trust note to have been paid, and then exhibiting and recording a release from himself as trustee, purporting to operate before he took title: *Held*, As between B. and the other lienors the former had a better equity, and that the acts and conduct of A., after he became the owner of the land, were not entitled to be considered as those of a trustee. *Smith vs. Perkins*, 73.
3. NATIONAL BANK—REAL ESTATE SECURITIES.—A National Bank does not transcend its powers in taking from a customer as collateral security for a loan to him, the note and mortgage of a third party, together with certain personal securities; and if the borrower becomes insolvent, and the personal securities prove insufficient the bank can maintain a bill to foreclose the mortgage. *Merchants Nat. Bank vs. Mears*, 158.
4. A MORTGAGE TO SECURE FUTURE ADVANCES, is good as against the assignee in bankruptcy for the amount of advances actually made thereon. *Schulze vs. Bolting*, 174.
5. A MISTAKE IN THE DESCRIPTION of the premises in such mortgage may be corrected as against the assignee to the same extent as would have been allowed against the mortgagor. *Id.*
6. PERSONAL LIABILITY OF PURCHASER OF EQUITY OF REDEMPTION.—When the payment of an outstanding incumbrance, created by

MORTGAGES—*Continued.*

the grantor of the equity of redemption, constitutes part of the purchase money, the law implies an undertaking by the purchaser to pay it, and the mortgagee may recover in assumpsit. *Twichell vs. Mears*, 211.

7. MORTGAGE—FORECLOSURE—TIME FOR REDEMPTION.—After a decree of this court foreclosing a mortgage, an objection that it does not give the time allowed for redemption by the Illinois statutes cannot be urged by creditors of the mortgagor except in connection with an offer to redeem. *Hards vs. Conn. Mutual Life Ins. Co.*, 234.

8. FOREIGN INSURANCE COMPANY—INVESTMENT—PUBLIC POLICY.—Insurance companies created by the laws of other states do not contravene the public policy of Illinois by investing their assets in mortgages upon real estate within that state. *Id.*

9. MECHANIC'S LIEN—LIS PENDENS.—After bill of foreclosure filed by mortgagee, it is not within the power of the mortgagor pending the suit, by contract with a mechanic without the consent of the mortgagee, to create an incumbrance upon the property which can in anywise affect the rights of the mortgagee, as they may be declared by final decree. *Id.*

10. ASSIGNMENT OF MORTGAGE—LIABILITY FOR DEFICIENCY.—An assignment by the mortgagor of his interest in the mortgaged premises, to a third party, who agrees to pay off the mortgage, will not prevent a deficiency decree being entered against him unless he has been released by the mortgagee. *Conn. Mutual Life Ins. Co. vs. Tyler*, 369.

11. RELEASE OF ASSIGNOR.—And the acceptance by the mortgagee of a second mortgage upon the same premises, from such assignee, would not constitute a release of the first mortgagor from his personal liability to pay a deficiency. *Id.*

12. RAILROAD MORTGAGE—FORECLOSURE.—Where a railroad mortgage has been foreclosed and bought in for the benefit of the bondholders, most of whom united in organizing and carrying on a new corporation, and afterwards certain creditors by judgments subsequent to the mortgage succeeded in obtaining a decree on a bill filed to set aside the foreclosure and subject the property to payment of their judgments: *Held*, that the decree rendered the foreclosure invalid only as to the creditors who filed the bill; and the bondholders who voluntarily took stock in the new company cannot again claim under the mortgage, nor can the trustee under the mortgage maintain a new bill of foreclosure for their benefit. *Barnes vs. C. M. & St. P. R. R. Co.*, 514.

MUNICIPAL BONDS.

1. MUNICIPAL BONDS—BONA FIDE HOLDER.—The mere fact that some of the interest coupons were overdue at the time of plaintiff's

MUNICIPAL BONDS—*Continued.*

purchase, is not sufficient to put him upon inquiry, or charge him with notice of any defenses to the bonds, especially, where, during the time these coupons were running, the negotiation of the bonds had been restrained by an injunction which was finally dissolved. *Preble vs. Board of Supervisors*, 358.

2. LIS PENDENS.—The pendency of a suit is not constructive notice to purchasers of negotiable paper, which is the subject of the suit. *Id.*

3. RES JUDICATA.—Where a county had filed a bill against a railroad company and its trustee to restrain the negotiation of bonds issued by the county to the company in aid of its construction, and the case had been decided against the county, it is estopped from setting up, against subsequent purchasers of such bonds, any grounds of illegality which might have been set up in the bill. *Id.*

4. The Supreme Court of Illinois having decided that the Legislature cannot by subsequent legislation, render valid a vote by a town to subscribe to railroad stock, if there was no law in force at the time of the subscription authorizing it, the Federal Court will follow that authority although in conflict with a prior decision of the United States Supreme Court. *Leslie vs. Town of Urbana*, 435.

5. ESTOPPEL.—Although a town has paid interest on its bonds for ten years, it is not estopped from denying their validity even in the hands of innocent purchasers. *Id.*

NATIONAL BANKS.

1. USURY—RENEWAL OF NOTES.—Where a National Bank discounts a note, reserving a usurious rate of interest, and the borrower gives a new note in renewal at legal interest, the bank is entitled to recover the amount of the renewal note, with interest, less the amount of the usury reserved on the original discount, credited as of that date. *National Bank of Madison vs. Davis*, 100.

2. STATUTE OF LIMITATIONS.—Usury, paid more than two years before the commencement of the suit, cannot be recovered nor credited upon the principal of the note. *Id.*

3. REAL ESTATE SECURITIES.—A National Bank does not transcend its powers in taking from a customer as collateral security for a loan to him, the note and mortgage of a third party, together with certain personal securities; and if the borrower becomes insolvent, and the personal securities prove insufficient the bank can maintain a bill to foreclose the mortgage. *Merchants Nat. Bank vs. Mears*, 158.

NAVIGATION OF RIVERS.

1. RIVER COMMERCE—STATE LEGISLATION—CONSTITUTIONAL LAW.—Until Congress assumes control of the commerce of a river, the state within whose boundaries such river wholly lies, may by legis-

NAVIGATION OF RIVERS—*Continued.*

lation authorize a company to maintain piers, dams and booms in the river for logging purposes, even though they may interfere with the navigation of the river. *Heerman vs. Beef Slough, etc., Co.*, 834.

2. ULTRA VIRES.—And if such company exceed its corporate powers in placing such obstructions in the river and in running logs, it is not for a Court of Equity, at the instance of a private individual to declare such improvements a nuisance; or regulate the subject by injunction or other decree. *Id*

3. EQUITY JURISDICTION.—If any person or class of persons pursuing lawful branches of commerce, take or exercise a too exclusive or unreasonable use or possession of the river, to the injury of other persons, the law affords an adequate remedy in damages, and a court of equity will not interfere. *Id.*

4. CHIPPEWA RIVER—PUBLIC HIGHWAY.—The public have a right to use the Chippewa river, in Wisconsin, as a highway for the transportation of logs and lumber. Such right is common to all, and is recognized and protected by the courts. *Id.*

5. It is the peculiar province of the Legislature to determine whether or not the benefit to the logging interest and to general commerce, accruing from the erection of such piers, dams, etc., and the running of logs, would more than counterbalance the hindrance to steamboat navigation which their use would necessitate; and the courts will not interfere to enjoin that which the law authorizes. *Id.*

6. OBSTRUCTIONS.—In the absence of specific legislation by Congress, the regulation of a navigable stream is left entirely with the state, and the Government cannot by bill or information prevent or abate any obstruction. *U. S. vs. Beef Slough, etc., Co*, 421.

7. Where Congress has passed acts for the survey and improvement of a navigable river, the court will not interfere with the existing use of the stream, unless it clearly appears that the acts complained of necessarily interfere with the operation of such legislation. *Id.*

NEGLIGENCE—*See* TELEGRAPH COMPANIES.

NEW TRIAL—*See* PRACTICE, 26.

NOTES, BILLS AND CHECKS—*See* INTEREST, 1.—CORPORATIONS, 3.

1. NOTE—FIRM LIABILITY.—Though a note is signed by the members of a firm, with their individual names, yet, if the consideration when received is treated as copartnership funds, the note is a firm liability. *In re Thomas & Sivyer*, 139.

2. DRAFT ACCEPTED AS MONEY.—If the amount necessary to redeem from a sheriff's sale is paid to the proper officer in a bank draft, which is accepted by the officer but not actually collected until after the expiration of the time for redemption, the redemption is nevertheless complete. It is not essential that the payment be

NOTES, BILLS AND CHECKS—*Continued.*
made in currency unless so required by the officer. *Buford vs. Henzier*, 177.
8. RE-INDORSEMENT OF NOTE—EXTINGUISHMENT OF LIABILITY OF INDORSER.—Where A., the payee of a note, indorsed it to B., who in the course of trade re-indorsed it to A., and then A. indorsed it to the plaintiff: *Held*, that the re-indorsement from B. to A. created no liability on the part of B. to A. nor to the plaintiff. *Howe Machine Co., vs. Hadden*, 208.
4. RAILROAD MORTGAGES—INDORSEMENT.—The president of a railroad company has the right to indorse and assign notes and mortgages given to it to aid in its construction, and the indorsee before maturity takes the notes free from any equities between the maker and the company. *Irwin vs. Bailey*, 523.
5. INDORSEMENT.—Where the note and mortgage were first attached to a bond of the company and transferred as collateral to it, a subsequent indorsement by the president is valid to pass the legal title to the equitable owner. *Id.*
6. A SUBSEQUENT INDORSEE may sue in his own name, though he has no actual interest in the note, if it was indorsed to him for that purpose. *Id.*
NOTICE—*See* LIS PENDENS—MORTGAGES, 2.
OFFICER DE FACTO—*See* CORPORATIONS, 7.
PARDONS.
1. A PARDON is an effectual satisfaction of a sentence for violation of the Internal Revenue Laws, and also operates as a complete release of the sureties on the bond from all liability for the same acts or breaches of duty charged in the indictment. *United States vs. Cullerton*, 166.
2. EFFECT OF PARDON.—The recital of a specific, distinct offense in a pardon by the President limits its operation to that offense, and such pardon does not embrace any other offense for which separate penalties and punishments are prescribed. *Ex parte Weimer & Reynolds*, 321.
3. A pardon from sentence for conspiracy to defraud the revenue, does not entitle the defendant to demand cancellation of a judgment of forfeiture for fraud upon the revenue. *Id.*
PARTNERSHIP—*See* EXEMPTIONS, 1, 2—BANKRUPTCY, 23.
1. DISSOLUTION—FIRM DEBTS.—A partner withdrawing firm assets, upon dissolution, as his interest in the partnership, takes them subject to the rights of the firm creditors, if the fund remaining is insufficient for the payment of their debts. This is true even though no fraud is intended, and the partners believed the remaining assets to be ample. *In re Sauthoff & Olson*, 35.
2. CREDITORS CAN FOLLOW FIRM ASSETS THOUGH CONVERTED INTO HOMESTEAD.—If the retiring partner invest the assets thus with-

PARTNERSHIP—*Continued.*

drawn by him, in a homestead, a court of equity will compel its surrender for the benefit of the creditors. *Id.*

3. SUBSEQUENT DEALINGS OF THE CREDITORS, with the remaining partner, and sales and credits by them do not estop them from enforcing their claim against the assets withdrawn. *Id.*
4. NOTES—FIRM LIABILITY.—Though a note is signed by the members of a firm, with their individual names, yet, if the consideration when received is treated as copartnership funds, the note is a firm liability. *In re Thomas & Sivyer*, 139.

PATENT LAW.

1. SPIRAL SPRING BED—PRIOR USE OF ARTICLE.—A claim or device for making a bed bottom of spiral coils, or wire coils interlaced or interlocked, so as to form a fabric, fastened in any form to the sides of the bedstead frame: *Held*, not patentable, because the same device was in general use for analogous purposes prior to the application for the patent. *Woven Wire Mattress Co. vs. Whittlesey*, 23.
2. DEFINITENESS OF DESCRIPTIONS IN FOREIGN PUBLICATIONS TO DEFEAT PATENT.—Though it is the settled law in this country that the description in foreign publications, in order to defeat a patent in this country, should be sufficiently definite for a person of ordinary skill to construct the machine from such description in the foreign publications, yet where such descriptions are fully as definite as the specifications in the application for the patent in this country, that will be sufficient to defeat the patent. *Id.*
3. BEDSTEAD FRAME.—The Farnham patent for a new and improved bedstead frame, sustained. *Id.*
4. PRINCIPAL AND AGENT.—A principal is not liable for the claim of a patentee under work done by a contractor who held a license, even though he has not paid his license fees or royalty. *Stow vs. City of Chicago*, 47.
5. NICOLSON'S AND STOW'S PATENTS.—If a device in use will perform a certain function or office, it is immaterial whether the patentee describes such performance, or even knew that it would so operate. *Id.*
6. WEDGE-SHAPED BLOCKS.—The use of wedge-shaped blocks in making a pavement is not patentable; that being the principle long since applied in laying cobble stone pavements. *Id.*
7. UNIFORMITY OF SPACING, and the use of a strip to secure the same in laying a pavement, is not patentable. *Id.*
8. CHANGE OF MATERIAL.—A mere change of material, as from stone to wood, or *vice versa*, is not patentable. *Id.*
9. MATTER OF JUDGMENT.—Mere matter of judgment or degree as to the amount of force to be used, is not patentable. *Id.*
10. OMISSION OF AN ELEMENT from a patent, so that the less number

PATENT LAW—*Continued.*

of parts will perform all the functions of the greater, is not an invention. *Id.*

11. DEGREE OF FORCE, in ramming or swaging, is not patentable. *Id.*
12. Sundry patents and processes for pavements commented upon. *Id.*
13. EXPIRED PATENTS—RIGHT TO USE OF NAME.—If a sewing machine has acquired a name which designates a mechanism or a peculiar construction, parts of which are protected by patents, other persons, after the expiration of the patents, have the right to construct the machine and call it by that name, because the name only expresses the kind and quality of the machine. *Singer Manfg. Co. vs. Larsen*, 151.
14. TRADE MARKS.—There can be no trade mark in the name "Singer Sewing Machine." *Id.*
15. "SINGER SEWING MACHINE."—While any one, not connected with the Singer Manufacturing Company, has the right to construct a "Singer Sewing Machine;" yet he cannot be permitted to do any act, the necessary effect of which, will make people believe that the machine he constructs and sells, is manufactured by the Singer Manufacturing Company. *Id.*
16. CANNED GOODS — NOVELTY — INJUNCTION—PROOF. — The main and principal feature of the art of canning foods of various kinds, being old and well known, a patent for any particular article of canned goods "as a new article of commerce" must be clearly sustained by proof, in order to sustain an injunction against other manufacturers of similar goods. *Wilson Packing Co. vs. Clapp*, 154.
17. PLACE OF INFRINGEMENT OF PATENT—INJUNCTION.—An injunction ought not to issue to restrain the infringement of a patent when it does not appear from the record that the defendant has ever made or sold any of the goods in the district. *Id.*
18. The sending of circulars to parties engaged in the trade, notifying them of a preliminary injunction, is improper. *Id.*
19. A patented invention is not anticipated by a prior device capable of producing the same results, but by different and more complicated and costly processes. *Gottfried vs. Bartholomae*, 219.
20. DIES—CHORD BAR HEADS—NOVELTY.—After the art of cutting dies in the face of a trip-hammer, or in the anvil upon which the trip-hammer works, so that articles could be shaped to a given pattern, had been developed, the device of a different pattern in dies for making chord bar heads was not a matter of invention. It lacked novelty. *Smith vs. American Bridge Co.*, 312.
21. The method of compressing and packing merchandise into convenient packages for sale and transportation, set forth in the complainant's patent of June 30, 1874, is not patentable. *King vs. Frostel*, 510.

PATENT LAW—*Continued.*

22. CANNED BEEF—NOVELTY.—The method of cutting up meat, preparing it with antiseptics, pressing, putting into cans, pressing afterwards, and then hermetically sealing the cans, is not patentable, for want of novelty. *Wilson Packing Co. vs. Clapp*, 545.
23. A patent for cooked meat put up in a solid form, in its natural state, without disintegration or desiccation, in hermetically sealed packages, cannot be sustained as a new article of commerce. *Id.*
24. FORM OF CAN.—The pyramidal form of can, for packing food, is not patentable. *Id.*
26. The Marshall and Wilson patents for canning beef not sustained. *Id.*

PRACTICE—*See* CONTRACTS, 1—CONSTRUCTION OF CONTRACTS.

1. FILE MARKS NOT CONCLUSIVE.—A petition in bankruptcy was marked as filed at "12 o'clock." An execution against the bankrupts' property was also marked as filed with the sheriff at "12 o'clock," the same date: *Held*, That the file-marks were not conclusive, and that it was competent to establish the priority of the execution lien by showing by parol testimony, that, in fact, the petition was not filed until 1 o'clock. *In re Roberts*, 426.
2. SERVICE ON CORPORATION.—Service upon a corporation in order to bring it in court must be made under the United States not under a State, statute. *Hume vs. P. C. & St. L. R. R. Co.*, 31.
3. DOMICILE OF CORPORATION.—A corporation, being the creature of local law, dwells only within the territorial boundaries of the sovereign or state which creates it, and it cannot be an inhabitant of another state. *Id.*
4. Under the Act of Congress of March 3, 1875, which declares that, "No civil suit shall be brought against any person by any original process in any other district than that whereof he is an inhabitant or in which he shall be found," a corporation cannot be served by process outside of the state where it was created. *Id.*
5. SERVICE ON AGENT OUTSIDE OF STATE.—The presence of an agent of a foreign corporation is not the presence of the corporation within the meaning of the act. *Id.*
6. FOREIGN CORPORATION—SERVICE OF PROCESS.—A foreign corporation doing business in Illinois, is liable to be sued there in the Federal Court, though there be no express provision of statute in regard to service. *Wilson Packing Co. vs. Hunter*, 429.
7. FEDERAL JURISDICTION.—Such a corporation is to be "found" there, within the meaning of the United States statutes, which provide that no suit shall be brought against any person in any district other than that in which he is an inhabitant, or where he is found. *Id.*
8. FORM OF ACTION.—Where a dispatch was concerning the payment of a forged draft, the fact that the plaintiff had a remedy *ex contractu*

PRACTICE—*Continued.*

against a solvent indorser, is not a bar to an action *ex delicto* against the telegraph company, and it is not necessary to sue the indorser first. *Strause vs. W. U. Tel. Co.*, 104.

9. FRAUD OF DIRECTORS — RIGHT OF STOCKHOLDERS TO BE MADE PARTIES TO SUIT.—Where any fraud has been perpetrated by the directors of a company, by which the property or interest of the stockholders is affected, the stockholders have a right to come in as parties to a suit against the company and ask that their property shall be relieved from the effect of such fraud. *Bayliss vs. L., M. & B. R'y Co.*, 193.

10. SIGNATURE OF COUNSEL TO BILL.—Where an attorney of this court signs a bill as solicitor for complainant, this is a sufficient compliance with the 24th Equity Rule, which requires all bills to be signed by counsel. *Stinson vs. Hildrup*, 376.

11. PLURIES EXECUTION—IRREGULARITY.—A levy and sale of lands under a *pluries* execution when a prior levy under the same judgment remained undisposed of, instead of issuing a *venditioni exponas*, is at most a mere irregularity which can only be taken advantage of in apt time. *Kerr vs. South Park Com'rs*, 276.

12. MORTGAGE—FORECLOSURE—TIME FOR REDEMPTION.—After a decree of this court foreclosing a mortgage, an objection that it does not give the time allowed for redemption by the Illinois statutes cannot be urged by creditors of the mortgagor except in connection with an offer to redeem. *Hards vs. Conn. Mutual Life Ins. Co.*, 234.

13. FEDERAL JURISDICTION—RES ADJUDICATA.—Where a cause has been removed from a State Court to the Federal Court, and a motion to remand for want of jurisdiction, has been overruled by the Circuit Justice then presiding, if the cause subsequently comes before the Circuit Judge, he will not review the question of jurisdiction. That is considered as settled if there is no appeal. *Turner vs. I., B. & W. R'y Co.*, 380.

14. PUBLICATION IN CHANCERY—REMOVAL OF CAUSE.—The fact that proof of the publication notice to a defendant in chancery was not made in the State Court, prior to the order of removal of the cause to the Federal Court, does not prevent the latter court having jurisdiction over such defendant, if the publication was actually made according to the state statute. *Id.*

15. JURISDICTION.—If a defendant voluntarily files an answer, the court acquires jurisdiction over him, whether any replication is put in to the answer or not; and the rights of such defendant, which were in question, are considered adjudicated by a decree in the case. *Id.*

16. DECREES — AMENDMENTS AT SUBSEQUENT TERM. — Though the court cannot change the essential parts of a decree after the term at which it was entered, yet it has the power subsequently to amend the decree as to the mode of its execution, the manner of a sale,

PRACTICE—*Continued.*

the time of publication of such sale, and the distribution of the proceeds arising therefrom. *Id.*

17. SAME.—By the original decree for the sale of a railroad, it was provided, that the purchasers should pay enough in money, to liquidate certain judgments, taxes, and other claims, if they should be allowed; and, by an amendment to the decree entered at a subsequent term, it was provided that the property should be sold subject to the judgments, taxes, claims, etc., in the hands of the purchasers: *Held*, that the court had the power to make such amendment. *Id.*

18. SETTING ASIDE MASTER'S SALE—INADEQUACY OF BID.—In order to set aside a master's sale in foreclosure proceedings on account of the inadequacy of the bid, it is not sufficient to show that the property has not realized its full value; the price must be so inadequate as to show that it is not the result of fair dealing and an honest purchase. *Id.*

19. ADVANCE BID—RESPONSIBILITY OF BIDDER.—Where parties desire to have the sale set aside for inadequacy of the bid, they must show that some person, who is responsible, will make an advance bid. *Id.*

20. NO REDEMPTION OF RAILROAD.—There is no redemption from the sale of railroad property under foreclosure proceedings in the Federal Courts in this circuit. *Id.*

21. DEPOSIT BY BIDDERS.—It is proper practice for the court to require each bidder, at a master's sale of large railroad interests, to make a deposit of $50,000. *Id.*

22. SALE SUBJECT TO CONTINGENT CLAIMS.—Where the amount of claims to be allowed against a railroad, depends upon a long course of litigation, it is proper for the court to order the property sold, to be subject to such claims as finally adjudicated. *Id.*

23. BIDDING IN PROPERTY BY COMMITTEE.—Where the property was bid in by a certain committee acting as agents of the bondholders of the railroad, it is not necessary that it should be shown further, who are their principals. *Id.*

24. ASSIGNEE IN BANKRUPTCY, if made a party to a suit, must come in and assert his rights, or he will be barred by decree on default as any other party. *Id.*

25. NEW TRIAL—MISCONDUCT OF JUROR.—A new trial will not be granted on the ground of misconduct of a juror, when it appears that the party asking for such new trial participated in and was a party to such misconduct. *United States vs. Valentine*, 404.

26. APPEAL BOND TO COVER INTEREST.—Where a party by appealing ties up a fund in court, the bond should provide for payment of interest during the pendency of the appeal. *Turner vs. I. B. & W. R'y Co.*, 527.

PRACTICE—*Continued.*

27. POWER OF ATTORNEY TO COMPROMISE—SATISFACTION OF JUDGMENT —WHEN SET ASIDE.—An attorney was employed to bring suit and collect the amount due. After obtaining judgment against the defendant, the attorney compromised with the defendant and accepted less than the full amount—and entered the judgment fully satisfied. The attorney failed to turn over the amount received: *Held*, that plaintiffs were entitled to have the satisfaction set aside, on condition that they would indorse on the judgment the amount received by the attorney. *Pierce vs. Brown*, 534.

28. RESISTING AN OFFICER.—Under Sec. 5398, Revised Statutes, it is as much an offense to resist an officer who is attempting to execute process, as it is to resist him when serving or attempting to serve process. Holding attached property after seizure is part of the execution of the process; and if a person resists or obstructs an officer thus holding property, he commits the statutory offense. *United States vs. McDonald*, 439.

29. CUSTODIAN.—Resistance to a special custodian of such property, who is employed by a United States Marshal—though such custodian be not a regularly appointed sworn deputy—is resistance to the Marshal within the meaning of the statute. *Id.*

30. GOOD FAITH OF OFFICER.—If an officer holding a writ of attachment against A., seizes the property of B., and in so doing acts in good faith, and on reasonable grounds for believing the ownership of the property to be in A., resistance by B. to service or execution of the process is unlawful. *Id.*

31. SEIZING B.'S PROPERTY ON WRIT AGAINST A.—But if an officer with process against A. seizes the property of B., and in so doing acts in bad faith, or without reasonable grounds for believing the ownership of the property to be in A., forcible assertion of the right of possession by B., would not constitute the offense named in the statute. *Id.*

32. Willful resistance and obstruction of an officer defined. *Id.*

PRINCIPAL AND AGENT.

1. LEASE.—In a lease of a theater, the lessee was described as "M. G., representing Messrs. C. A. C. & Co., manager of the Opera Company," and the lease was signed by "M. G. representing C. A. C. & Co." One clause of the lease was: "The said M. G. agrees to pay," etc.: *Held*, That M. G. was liable as principal, and that the words added to his name were simply words of description. *Grau vs. McVicker*, 18.

2. PATENT LAW.—A principal is not liable for the claim of a patentee under work done by a contractor who held a license, even though he has not paid his license fees or royalty. *Stow vs. City of Chicago*, 47.

PROMISSORY NOTES—*See* NOTES, BILLS AND CHECKS.

PROPRIETOR—*See* REVENUE LAW, 11.
PUBLIC HIGHWAYS—*See* NAVIGATION OF RIVERS.
PUBLIC POLICY—*See* RAILROADS, 13.
RAILROADS—*See* PRACTICE, 18–24; NOTES, BILLS AND CHECKS, 4–5; MORTGAGES, 12.

1. FORECLOSURE—RECEIVER.—The appointment of a receiver pending proceedings for foreclosure, is a matter resting in the sound discretion of the court. *Tyson vs. Wabash R'y Co.*, 247.
2. DEFAULT OF PAYMENT.—The mere fact that there has been a default in the payment of the debt is no ground for the appointment of a receiver, unless there be a stipulation in the mortgage that the mortgagee shall have the rents. *Id.*
3. APPOINTMENT OF RECEIVER—WHEN MADE.—The court will not, in deference to the mere technical rights of a very small minority of bondholders of a railroad corporation, appoint a receiver where it appears that such action would imperil, if not destroy, the interests of others whose rights are entitled to equal consideration. *Id.*
4. DISCRETIONARY POWER—ALL INTERESTS TO BE CONSIDERED—FUNDING SCHEME.—In the exercise of the broad discretion which the court has in the matter of appointing a receiver, it will not make such appointment if it perceives that a much greater injury would result to those interested in the railroad than by leaving the property in the hands then holding it, especially when it appears that the large majority of the stock and bondholders favor a funding plan then being negotiated. *Id.*
5. RECEIVER OF RAILROAD—ALLOWANCE OF "BACK" CLAIMS.—The court can require the receiver of a railroad to pay the claims of operatives and supply-men, owing at the time of his appointment, and even to hold the property subject to them; not as a lien on the road but in the exercise of the equitable discretion of the court. *Turner vs. I., B. & W. R'y Co.*, 315.
6. TIME WITHIN WHICH CLAIMS ARE ALLOWED.—In fixing a time within which such claims will be allowed and ordered paid, the court will adopt by analogy the rule of the state statutes in relation to liens on railroads for work done, and supplies and materials furnished. *Id.*
7. JUDGMENT AGAINST RECEIVER.—A receiver of a railroad appointed in foreclosure proceedings is the agent of the bondholders and the trustees, and a judgment rendered against him by a court of competent jurisdiction, is binding upon the interests of the bondholders. *Turner vs. I., B. & W. R'y Co.*, 527.
8. LIABILITY OF RECEIVER.—A receiver is liable for damage to engines rented by him arising from omission to make necessary repairs. *Id.*
9. NO REDEMPTION OF.—There is no redemption from the sale of railroad property under foreclosure proceedings in the Federal Courts in this circuit. *Turner vs. I., B. & W. R'y Co.*, 380.

RAILROADS—*Continued.*

10. When Title to Lands Vests in R. R. Co.—Under a Government land grant to a railway company, the patents for the land were to be issued, *pro tanto*, on the completion of any twenty consecutive miles of road, and it was provided in the grant that the lands thereby granted should, when patented, be subject to the disposal of the company, for the purposes of construction and equipment and no other: *Held*, that this did not create the relation of trustee and *cestui que trust*, between the railroad company and the Government as to land so patented, but that the patents when issued vested the complete title in the company. *N. W. R. W Co. vs. Board of Supervisors*, 414.
11. Taxation.—Such lands upon the issuing of the patents become subject to taxation. *Id.*
12. *It seems* that the remedy of the Government in case of misapplication of such lands, or their proceeds, would be by proceedings against the company or its officers, and that the titles of purchasers, or mortgagees, of the lands could not be affected. *Id.*
13. Power of Railroad Corporations in Indiana to Execute Leases.—There being no statute in Indiana which in terms forbids or prohibits railroad corporations of that state from executing leases of their property, a lease made by such a corporation, and which is neither in violation of any statute, nor against the public policy of the state, is valid. *P., C. & St. L. R'y Co. vs. C., C. & I. C. R'y Co.*, 456.
14. The laws of Indiana, and the decisions in that state bearing upon this point, considered. *Id.*
15. One of the defendant corporations—a corporation of the state of Indiana—leased its lines to the plaintiff—a corporation of the state of Ohio. The lease was made for the purpose of forming a connecting line of travel and traffic: *Held*, that such lease was not in contravention of the statutes or public policy of Indiana, and that the lessor corporation had power to execute it. *Id.*
16 Place of Execution of Lease.—It is not essential to the validity of such a lease, (in the absence of express statutory provision,) that its original execution or subsequent ratification should have been evidenced by corporate action taken by the lessor, within the limits of the state by which it is created. *Id.*
17. The lessee corporation was not forbidden by the laws of Ohio to take the lease, in question, of the road in Indiana. *Id.*
18. Eviction—Mortgage—Decree of Sale.—An unexecuted decree, for the sale of a portion of the demised railroad, for the purpose of satisfying a mortgage made prior to the lease, is not such an eviction of the lessee, by paramount title, as to terminate the lease. *Id.*
19. So, also, the appointment of receivers for the lessor corporation, but

RAILROADS—*Continued.*

with instructions not to disturb the possession of the lessee, is not an eviction. *Id.*

20. STIPULATION IN LEASE—CLASSIFICATION OF RAILROAD INDEBTEDNESS—PERFORMANCE.—A stipulation by the lessor corporation to arrange, provide for, adjust and classify its indebtedness, was *held* to be one of substance which it must perform. *Id.*

21. TIME OF PERFORMANCE.—And the lessee is not bound to wait for an indefinite or an unreasonable time for such arrangement, adjustment and classification of the lessor's indebtedness, to be effected. *Id.*

22. RESCISSION OF CONTRACT—TIME GIVEN FOR PERFORMANCE.—But in such case, where the lessee has acted under the lease before such arrangement and classification has been made, the court will not decree a rescission of the contract upon the application of such lessee, until the lessor is given a reasonable time within which to comply with the stipulation; especially, where by the frame of its bill of complaint, the lessee has prayed for a rescission, unless the lessor shall specifically perform within a reasonable time to be fixed by the court. *Id.*

23. In this case the court considered that eight months from the date of the order would be a reasonable time within which the lessor should carry out the agreement. *Id.*

24. CONSTRUCTION OF CONTRACTS.—Contracts, when their meaning is not clear, are to be construed in the light of the circumstances surrounding the parties when they were made, and the practical interpretation which they by their conduct have given to the provisions in controversy. *Id.*

REAL ESTATE—*See* CONVEYANCES—MORTGAGES—ADVERSE POSSESSION—BANKRUPTCY, 10–12.

RECEIVER—*See* RAILROADS.

FRAUD.—Where the debtor had made disposition of from $150,000 to $200,000 worth of stock without accounting for the proceeds, or paying his indebtedness, and then made an assignment under the state law, of about $18,000 worth of goods, it was *held* that this was a proper case for the appointment of a receiver, for the purpose of un-earthing if possible the disposition of the property. *Strong vs. Goldman*, 552.

REDEMPTION—*See* JUDICIAL SALE; MORTGAGES, 7; PRACTICE, 21.

RELEASE—*See* MORTGAGES, 11.

REMOVAL FROM STATE COURT—*See* PRACTICE, 14, 15.

RENUNCIATION—*See* CONTRACTS, 1–4.

RESCISSION OF CONTRACT—*See* RAILROADS, 22, 23.

RESISTING AN OFFICER—*See* PRACTICE, 29–33.

RES JUDICATA—*See* PRACTICE, 14.

Where a county had filed a bill against a railroad company and its

RES JUDICATA—*Continued.*

trustee to restrain the negotiation of bonds issued by the county to the company in aid of its construction, and the case had been decided against the county, it is estopped from setting up, against subsequent purchasers of such bonds, any grounds of illegality which might have been set up in the bill. *Preble vs. Board of Supervisors*, 358.

REVENUE LAW.

1. INJUNCTION AGAINST COLLECTION OF ASSESSMENT.—Allegations in a bill, that an assessment made by the Commissioner of Internal Revenue, is irregular, and in violation of law, and void, do not constitute ground for an injunction to restrain the collection of the assessment. *Alkan vs. Bean*, 88.
2. Statements by a Collector of Internal Revenue, to the effect that the Government has no claim upon distillery property for unpaid taxes, do not affect the right of the Government to assert an existing lien for taxes upon such property. *Id.*
3. The remedy by bill in equity to collect assessments, conferred by Sec. 3,207, Revised Statutes, is cumulative. *Id.*
4. LIEN OF GOVERNMENT.—Sec. 3,224, Revised Statutes, is not limited in its application to the party taxed. A purchaser of distillery property upon which there is an existing lien for taxes due to the Government, cannot acquire the same freed from such lien, though he purchase in good faith, for value, and without notice of the lien. *Id.*
5. LIEN—FORFEITURE.—In a case where proceedings were instituted for forfeiture of a distillery, followed by seizure and subsequent release of the property on bond under Section 3,331, Revised Statutes, but which were afterwards discontinued by the Government without any judicial declaration of forfeiture, a lien for unpaid taxes is not lost or affected by such bonding and release of the property in the forfeiture proceeding, and a subsequent purchaser from the former owner takes the property incumbered by the lien. *Id.*
6. DISTILLER'S WAREHOUSE BOND.—The fact that distilled spirits are seized, condemned and sold for violation of the Internal Revenue Law while bonded, does not release the obligors on the warehouse bond. *United States vs. South Branch Dist. Co.*, 162.
7. The fact that the purchaser at the sale paid the tax is immaterial.
8. SENTENCE AS A BAR.—Where a distiller is indicted for violation of the Internal Revenue Laws, his conviction and sentence for such violations is not a bar to such action, unless the sentence is actually fulfilled—if a fine by payment, and if imprisonment, by serving out the term. *United States vs. Cullerton*, 166.
9. A PARDON is an effectual satisfaction of such sentence, and also operates as a complete release of the sureties on the bond from all

REVENUE LAW—*Continued.*

liability for the same acts or breaches of duty charged in the indictment. *Id.*

10. TRANSPORTING BARRELS WITH UNCANCELLED STAMPS.—In an action to recover a penalty under Section 3,324 of the Revised Statutes, for transporting empty barrels upon which were uneffaced Internal Revenue stamps: *Held*, that the defendant was bound to know whether or not there were stamps upon the barrels which had not been effaced or obliterated. *United States vs. Goodrich Trans Co.*, 224.
11. MEANING OF "PROPRIETOR."—In Section 3,251 of Revised Statutes, by which it is provided that every proprietor of any still shall be liable for taxes on the distilled spirits produced therefrom, the word "proprietor" is used in the sense of an owner, who, whether in personal possession or not, has the exclusive right to, and the control over, the premises. *United States vs. Van Slyke*, 227.
12. A lessee is a proprietor, but the lessor is not. *Id.*
13. INTEREST OF DEFENDANT.—Under the same section, in order to hold the defendant liable as being interested in the use of the still, a direct interest in the business must be shown. His interest as a lessor, or as a creditor who expected to collect his claims if the business proved successful, is not sufficient. *Id.*
14. CROOKED WHISKY.—Knowledge by defendant that illicit spirits were being manufactured on the premises, does not render him liable for the tax. *Id.*
15. DESTRUCTION OF SPIRITS BY FIRE—TAXES THEREON.—The fact that distilled spirits placed in a distillery warehouse were destroyed by fire because of the absence of the Government storekeeper from the warehouse, does not release the bondsmen from liability for the amount of the taxes which were due on the spirits. The Government cannot be made a loser by a neglect of duty by an officer. *United States vs. Farrell*, 259.
16. WHEN TAX ON DISTILLED SPIRITS ATTACHES.—The liability of a distiller for the tax on distilled spirits attaches so soon as the spirits are produced; and if he places them in a warehouse, giving bond for the payment of the tax on their removal and within one year from the date of the bond, and the warehouse and spirits are destroyed without any negligence on his part, this does not release him from liability for payment of the tax. *Id.*
17. A destruction by fire is a "removal" within the meaning of the statute and the bond. *Id.*
18. FORFEITURES—PERSONAL PROPERTY—OWNERSHIP.—Personal property situated upon distillery premises and used in the business of illicit distilling is subject to forfeiture by the Government, irrespective of its ownership. *United States vs. One Copper Still*, 270.

REVENUE LAW—*Continued.*

19. SAME—KNOWLEDGE OF FRAUD.—Neither the owner of personal property, nor his mortgagee, though innocent of any knowledge of its fraudulent use, can maintain a claim thereto paramount to the rights of the United States, in proceedings for the condemnation of the same for use in illicit distillation. *Id.*

20. TIME OF FORFEITURE.—Where a statute in direct terms denounces a forfeiture of property as a penalty, the forfeiture takes place at the time the offense is committed and operates as a statutory transfer of the right of property to the Government. *Id.*

21. ASSESSMENT AGAINST DISTILLER.—The validity of an assessment against a distiller may be inquired into, by defendants answering a bill by the United States to subject to the payment of such assessment, lands transferred to them. *United States vs. Rindskopf*, 507.

22. BURDEN OF PROOF.—When the defendants have rebutted the presumption of law as to the validity of the assessment the burden of proof is shifted upon the Government to establish its validity. *Id.*

RIVER COMMERCE—*See* NAVIGATION OF RIVERS.

SATISFACTION OF JUDGMENT—*See* ATTORNEY AND CLIENT.

SERVICE OF PROCESS—*See* PRACTICE, 2, 6, 31, 32.

SET-OFF—*See* CONTRACTS, 8.

SLANDER AND LIBEL.

1. WORDS ACTIONABLE PER SE—ADULTERY.—A false publication concerning one that there are "suits pending against him to the effect that he has put himself in unlawful relations with the wives of other men" is libellous *per se*. *Broad vs. Deuster*, 265.

2. INUENDO.—The words being actionable *per se*, an inuendo is not needed to connect them with any extrinsic facts. *Id.*

3. SPECIAL DAMAGE—PLEADING.—Where a publication is libellous *per se*, special damage to the business of the person may be shown, though the words were not published concerning that business, and it is not necessary to allege the names of the customers who have ceased to do business with the plaintiff in consequence of the publication. *Id.*

SQUATTER CLAIMS—*See* ADVERSE POSSESSION.

STATUTE OF LIMITATIONS—*See* LIMITATIONS.

STOCKHOLDERS—*See* CORPORATIONS.

SUBROGATION—*See* ADMIRALTY, 8.

SURETY—*See* BONDS—CORPORATIONS, 8.

TAXATION—*See* RAILROADS, 10, 11.

TAXES—*See* REVENUE LAW.

TELEGRAPH COMPANIES.

1. LIABILITY.—A telegraph company, negligently delivering forged dispatches, is liable for the damage thereby sustained. *Strause vs. W. U. Tel. Co.*, 104.

TELEGRAPH COMPANIES—*Continued.*

2. FORM OF ACTION.—Where the dispatch was concerning the payment of a forged draft, the fact that the plaintiff had a remedy *ex contractu* against a solvent indorser, is not a bar to an action *ex delicto* against the company, and it is not necessary to sue the indorser first. *Id.*
3. DUTY OF TRANSMISSAL.—It cannot be expected that a message left for transmission with a telegraph company at a small station shall be forwarded and delivered at its destination as quickly as though it had originated at a large office. *Behm vs. W. U. Tel. Co.*, 131.
4. AT A SMALL STATION, it is not the duty of the company to keep more than one operator, and if a message is left with a messenger during the operator's absence, and the message was forwarded on the operator's return, after a reasonable absence, the company is not guilty of negligence. *Id.*
5. If the usual line of business between the two points is through a repeating office, the company is entitled to a reasonable time for the delay on account of other business at such repeating office. *Id.*
6. MEASURE OF DAMAGES.—Where the face of the dispatch does not indicate that the sender is liable to sustain loss if the dispatch is not promptly forwarded, and the company is not so informed, it is liable only for nominal damages. *Id.*

TENANTS BY ENTIRETIES—*See* BANKRUPTCY, 10–12.

TRADE MARKS.

1. There can be no trade mark in the name "Singer Sewing Machine." *Singer Manuf'g Co. vs. Larsen*, 151.
2. CONSTITUTIONAL LAW.—The legislation by Congress upon the subject of trade marks, of July 8, 1870, is unconstitutional. *Leidersdorf vs. Flint*, 327.
3. It cannot be sustained under the power to legislate in favor of authors and inventors, nor under the power to regulate commerce. *Id.*
4. "PARABOLA."—The word "Parabola" used as the name of needles not being descriptive of any peculiar quality of the needles was *held*, a valid trade mark. *Roberts vs. Sheldon*, 398.
5. INFRINGEMENT.—"William Clark & Sons' Parabola Needles" is an infringement of "Roberts' Parabola Needles." *Id.*
6. ABANDONMENT.—Abandonment of a trade mark is not made out by showing numerous infringements in which the owners of such trade marks have not acquiesced. *Williams vs. Adams*, 452.
7. "YANKEE."—The term "Yankee" applied as the name or label upon soap: *Held*, to be a valid trade mark. *Id.*

TRUSTS AND TRUSTEES—*See* MORTGAGES.

ULTRA VIRES—*See* NAVIGATION OF RIVERS, 2.—CORPORATIONS, 3.

USURY—*See* INTEREST.

VOLUNTARY ASSIGNMENT—*See* BANKRUPTCY, 1.

WAGER CONTRACTS—*See* CONTRACTS, 5, 6.